SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 681

C. G. LEWELLYN, FORMERLY COLLECTOR OF UNITED STATES INTERNAL REVENUE FOR THE TWENTY-THIRD DISTRICT OF PENNSYLVANIA, PLAINTIFF IN ERROR

vs.

ADELAIDE H. C. FRICK, HELEN C. FRICK, CHILDS FRICK, ET. AL., ETC.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

INDEX

1 In United States District Court for the Western District of Pennsylvania

ADELAIDE H. C. FRICK, HELEN C. Frick, Childs Frick, H. C. McEldowney, and William Watson Smith, Executors of the Last Will of Henry C. Frick, Deceased vs. C. G. LEWELLYN, Formerly Collector of United States Internal Revenue for the Twenty-third District of Pennsylvania	No. 2831. Nov. term, 1922

Docket entries

Oct. 7, 1922. Praecipe for summons and plaintiff's statement filed.
" " " Summons in assumpsit issued ret'ble to 1st Mon. of Nov. next.
" 9, " Summons returned served with copy of plaintiff's statement of claim on C. G. Lewellyn, by handing to and leaving a true and attested copy thereof with C. G. Lewellyn, personally at Pittsburgh, Pa., Oct. 9, 1922.
Dec. 6, " Affidavit of defense filed.
" 13, " Praecipe for issue filed.
June 28, 1923. Stipulation waiving jury trial filed.
Nov. 26, " Trial without jury; case argued C. A. V.
Apr. 1, 1924. Stipulation as to facts filed.
June 5, " Opinion filed and entered directing judgment for the plaintiffs with interest and costs.
" 6, " Pursuant to the foregoing action of the court, judgment is hereby entered in favor of the plaintiffs, Adelaide H. C. Frick, Helen C. Frick, Childs Frick, H. C. McEldowney, and William Watson Smith, executors of the last will of Henry C. Frick, deceased, and against the defendant, C. G. Lewellyn, formerly collector of United States internal revenue for the twenty-third district of State of Pennsylvania, in the sum of one hundred eight thousand six hundred fifty-seven & $\frac{38}{100}$ ($108,657.38) dollars, with interest thereon from May 31, 1921, viz, $19,666.99, and in the aggregate amount of one hundred twenty-eight thousand three hundred twenty-four and $\frac{37}{100}$ ($128,324.37) dollars, and costs of suit. -J. Wood Clark, clerk.

Aug. 1, 1924. Testimony filed.
" " " Defendant's exceptions filed and order entered overruling same, to which action defendant excepts, and bill of exceptions is allowed and sealed.
" 27, " Petition for writ of error and order allowing same filed and entered.
" " " Assignment of errors filed.
" " " Bill of exceptions signed, sealed, and filed.
Sept. 3, " Præcipe re record sur writ of error filed.
" 4, " Citation awarded and issued, and service accepted by S. J. Nolin, of counsel for defendants-in-error.
" " " Writ of error issued and copy lodged in clerk's office.
" 29, " Petition of Warren H. Van Kirk, special assistant United States attorney, to amend writ of error and citation; consent of S. G. Nolin, of counsel for plaintiff; and order of court filed and entered directing that the writ of error and the citation heretofore issued be each amended.
" " " Amended citation awarded and issued and service thereof accepted by S. G. Nolin, of counsel for defts. in error.
" " " Amended writ of error issued and copy lodged in clerk's office.

2 In United States District Court

[Title omitted.]

Præcipe for summons

To J. Wood Clark, Esq., Clerk.

Issue summons in assumpsit, returnable to the next return day.

George B. Gordon,
Attorneys for Plaintiffs.

In United States District Court

Statement of claim

Adelaide H. C. Frick, Helen C. Frick, Childs Frick, H. C. McEldowney, and William Watson Smith, executors of the last will of Henry C. Frick, deceased, the above-named plaintiffs, bring this suit against C. G. Lewellyn, formerly collector of the United States internal revenue for the twenty-third district of Pennsyl-
3 vania, at the present time a resident of the city of Uniontown, in the western district of Pennsylvania, the defendant above named, to recover of said defendant damages in the sum hereinafter mentioned upon a cause of action of which the following is a statement:

(1) Of the plaintiffs, Adelaide H. C. Frick, Helen C. Frick, H. C. McEldowney, and William Watson Smith, are citizens of Pennsylvania and have their domicile and residence in the city of Pittsburgh, in the western district of Pennsylvania. The said Childs Frick is a citizen of New York, and has his domicile and residence at Roslyn, Long Island, in the southern district of New York.

(2) C. G. Lewellyn, the defendant in this case, is a citizen of the State of Pennsylvania, a resident of the city of Uniontown, in the western district of Pennsylvania, and at the time of the committing of the grievances hereinafter mentioned and until the 1st day of August, 1921, was the collector of the United States internal revenue for the twenty-third district of the State of Pennsylvania. Said internal revenue district comprises within its boundaries said city of Pittsburgh, which was the place of the last domicile and residence hereinafter mentioned of Henry C. Frick, deceased.

(3) Henry C. Frick died on December 2, 1919, having his domicile and residence at the time of his death in the city of Pittsburgh, in the western district of Pennsylvania, and in the twenty-third internal revenue district of Pennsylvania, leaving a last will and testament, which was duly admitted to probate by the register of wills of Allegheny County, Pennsylvania, on December 6, 1919. Letters testamentary were duly issued to the plaintiffs above named, who duly qualified as executors of the will of said Henry C. Frick, deceased.

4 (4) On December 2, 1920, the plaintiffs, pursuant to the requirements of the United States revenue act of 1918, duly made a return for Federal estate tax of the estate of said Henry C. Frick, deceased, to the defendant as internal revenue collector for the twenty-third district of Pennsylvania. Said return was made in duplicate on Form 706 (Revised November, 1919) and was duly verified by the oath of H. C. McEldowney, one of the executors.

(5) In Schedule "C" of said return the executors, complying with the requirements of the United States revenue act of 1918 and the regulations of the Treasury Department, listed as assets of the estate of Henry C. Frick, deceased, the excess over $40,000 of the total amount received by beneficiaries other than the executors of eleven policies of life insurance on the life of said Henry C. Frick, deceased. The names of the companies issuing said policies, the policy numbers, the names of the beneficiaries at the time of decedent's death, and the respective amounts received by said beneficiaries are all set forth in Schedule 1, hereto attached and made part hereof. In said schedule are set forth also the dates of the original issues of the policies, the names of the original beneficiaries, and the substitutions of new beneficiaries in the instances where such substitutions were subsequently made. The total amount received by the beneficiaries of said policies was $474,629.52. The total amount of said insurance payable to beneficiaries other than the executors in excess of $40,000 was $434,629.52. On said sum of $434,629.52 the defendant, as collector of the United States internal revenue for the twenty-

third district of Pennsylvania, erroneously and unlawfully levied and collected from the plaintiffs an estate tax amounting to $108,657.38 against the estate of Henry C. Frick, deceased, as hereinafter set forth.

5 (6) On or about January 22, 1921, the defendant, as collector of the United States internal revenue for the twenty-third district of Pennsylvania, claiming to act in pursuance of the provisions of the United States internal revenue act of 1918, served a notice and demand for payment on the plaintiffs of an estate tax assessed by the Commissioner of Internal Revenue against the estate of said Henry C. Frick, deceased, in the sum of $6,338,898.68. A copy of said notice and demand is attached hereto, made part hereof, and marked "Exhibit A."

(7) Later, in May, 1921, after the Commissioner of Internal Revenue, on the application of the plaintiffs, had made extensions of the time of payment of said demanded tax, the plaintiffs paid the whole of said demand to the defendant, paying on May 4, 1921, the sum of $1,584,724.67 on account, and paying on May 31, 1921, the sum of $4,754,174.01, the balance of said claim in full. The plaintiffs made said payments involuntarily, under compulsion and threats of the defendant to issue warrants of distress against the decedent's property for the collection thereof, making the payments also for the purpose of avoiding the imposition on the plaintiffs by the defendant of penalties and pains for the non-payment thereof, and under protest, a copy of which is hereto attached, made part hereof, and marked "Exhibit B."

(8) On or about December 29, 1921, the plaintiffs made to the Commissioner of Internal Revenue a claim for refund of said estate tax of $108,657.38 assessed against decedent's estate on said life insurance policies, filing said claim for refund with D. B. Heiner, then United States internal revenue collector for the twenty-third district of Pennsylvania. A copy of the claim for refund is attached hereto, made part hereof, and marked "Exhibit C."

6 (9) On or about January 23, 1922, the Commissioner of Internal Revenue formally rejected the plaintiffs' claim for refund in its entirety and on the merits thereof. A copy of the decision of the Commissioner of Internal Revenue dated January 23, 1922, is hereto attached, made part hereof, and marked "Exhibit D."

(10) More than $500,000 of the net value of the estate of the decedent was taxable at the rate of twenty-five per cent. Part of the said sum of $6,338,898.68 levied as the total United States estate tax on the estate of the decedent and paid by the plaintiffs as his executors consisted of the sum of $108,657.38, which was assessed, as aforesaid, at the rate of twenty-five per cent on the sum of $434,629.52, the aggregate in excess of $40,000.00 of the sums received by the beneficiaries of the life-insurance policies designated in Schedule 1 hereto attached. Said life-insurance policies were policies taken out by the decedent on his own life and made payable to the respective individual beneficiaries as set forth in Schedule 1. The

policies became vested in the several beneficiaries in the decedent's lifetime, were not part of the estate or property which the decedent left at his death, and were not liable to the payment of his debts or distributable as part of his estate. The beneficiaries have received the proceeds of said policies solely by reason of their ownership thereof, and not by virtue of any succession, inheritance, or transfer laws of the State of Pennsylvania or of any other State or of the United States.

7 (11) In so far as the United States revenue act of 1918, or section 402, subdivision (f) thereof, purports to tax the excess over $40,000 of the proceeds of said eleven life-insurance policies designated in Schedule 1 attached hereto, or any part thereof, as part of the estate or property of Henry C. Frick, deceased, it is unconstitutional and void in that the collection of such tax is a taking of plaintiffs' property without due process of law in violation of the fifth amendment of the Constitution of the United States.

(12) No part of said sum of $108,657.38 has been repaid to the plaintiffs, and the whole amount thereof, with interest thereon from May 31, 1921, remains due and owing from the defendant to the plaintiffs.

(13) This is a suit of civil nature at common law, and the matter in controversy, exclusive of interest, exceeds the sum of $3,000; and this suit and the cause of action herein set forth arise under the Constitution and laws of the United States and under the laws of the United States providing for internal revenue.

Wherefore the plaintiffs claim damages of the defendant in the sum of $108,657.38, with interest thereon from May 31, 1921, together with the costs of this suit.

GEORGE B. GORDON,
Attorneys for the Plaintiffs.

[Jurat showing the foregoing was duly sworn to by H. C. McElDowney omitted in printing.]

9 *Exhibit to statement of claim*

SCHEDULE 1.— *Insurance on the life of Henry C. Frick*

Company	Policy number	Beneficiary	Amount received
Equitable Life Assurance Society of United States	164814	Mrs. Henry C. Frick	$114,000.00
Equitable Life Assurance Society of United States	294284	"	78,014.01
Mutual Life Insurance Company of New York	163109	"	15,202.28
New York Life Insurance Company	103932	"	13,581.80
New York Life Insurance Company	497958	Miss Helen C. Frick	65,501.8
New York Life Insurance Company	501052	"	25,193.00
Connecticut Mutual Life Insurance Company	190366	"	71,286.76
State Mutual Life Assurance Company of Worcester, Mass.	23135	"	28,966.60
Berkshire Life Insurance Company	31580	"	27,843.60
Mutual Benefit Life Insurance Company of New Jersey	158055	"	15,009.67
Nederland Life Insurance Company, Ltd	54105	"	20,000.00
			$474,629.52

SCHEDULE 1.—*Insurance on the life of Henry C. Frick*—Continued

(Showing the names of the original beneficiaries and the dates of issue of the policies.)

Company	Policy number	Date of issue of policy	Original beneficiary
Equitable Life Assurance Society of United States	164814	Nov. 23, 1901	Ada H. C. Frick.
Equitable Life Assurance Society of United States	294284	Mar. 17, 1885	"
Mutual Life Insurance Company of New York	163109	Dec. 19, 1874	"
New York Life Insurance Company	105932	Feb. 2, 1874	"
New York Life Insurance Company	497958	Dec. 22, 1892	Estate of insured.
New York Life Insurance Company	501052	Dec. 29, 1892	"
Connecticut Mutual Life Insurance Company	196366	Mar. 21, 1890	"
State Mutual Life Assurance Company of Worcester, Mass.	23135	Mar. 18, 1890	"
Berkshire Life Insurance Company	31580	Mar. 18, 1890	"
Mutual Benefit Life Insurance Company of New Jersey	158055	Apr. 7, 1890	"
Nederland Life Insurance Company, Ltd	54105	May 31, 1895	"

(Changes of beneficiaries)

Ada H. C. Frick, named as beneficiary in the first four policies, is Mrs. Henry C. Frick, the wife of the insured. No changes of beneficiaries were made in any of these policies.

On or about June 22, 1917, and more than two years before his death, the insured, by assignment or by substitution, changed the beneficiaries of the seven policies originally made payable to the estate of the insured, making them payable to his daughter, Helen Clay Frick, in case she should be living at the time of his death.

In the assignments of policies numbered 497958 and 501052 of the New York Life Insurance Company and policy numbered 196366 of the Connecticut Mutual Life Insurance Company,
11 the insured reserved the right to revoke the assignments. And in the assignment of the policy of the Connecticut Mutual Life Insurance Company he reserved the right also to receive the dividend and profits. Mr. Frick, however, did not afterwards revoke any of the assignments or do anything else with respect to any of the policies, leaving them to perform their usual function of family protection.

12 EXHIBIT A TO STATEMENT OF CLAIM

Treasury Department.
U. S. Internal Revenue.
Form 1–17—Revised Nov., 1919.

Original

NOTICE AND DEMAND FOR TAX AND RECEIPT

Collector's office, 23rd district of Penna., at Pittsburgh, Pa. Date, January 22, 1921

List 23A. 1920. Dec. 1. 3.
(Year) (Month) (Folio) (Line)

Notice is hereby given that there has been assessed against you the amount set opposite for the liability named, which tax is payable to me. Demand is made for the payment of said tax on or before the date given below.

Due date Feb. 1, 1921.
Original due date Dec. 2, 1920.

C. G. LEWELLYN,
Collector of Internal Revenue.

Estate tax
(Character of tax or liability)
Died Dec. 2, 1919

TAXES, PENALTIES, ETC.

Amount of tax	$6,338,898.68
-- per cent penalty	
5 per cent penalty	
Total	

Received payment.

Collector of Internal Revenue.

Name	Frick, Henry Clay, Estate of. Adelaide H. Frick et al., executors.
No. and street	7200 Penn Ave.
City and State	Pittsburgh, Pa.

This notice must be presented at the time payment is tendered, as when properly stamped "Paid" by the collector it becomes a receipt for taxes. See instruction on back

13 EXHIBIT B TO STATEMENT OF CLAIM

PROTEST

To the Collector of Internal Revenue for the 23rd District of the State of Pennsylvania:

The undersigned, executors of the last will and testament of Henry C. Frick, deceased, on December 2, 1920, filed with you, in duplicate, a return under oath in accordance with the provisions of section 404, Title IV, of the revenue act of 1918. Thereafter, to wit, on or about the 22nd day of January, 1921, the said executors re-

ceived a notice from you dated January 22, 1921, a copy of which is hereto attached, marked "Exhibit A," advising them that th re had been assessed by the Commissioner of Internal Revenue a tax against the estate of Henry C. Frick under the internal revenue laws of the United States amounting to $6,338,898.68, and that said tax was payable to you. The notic , among other things, contains a demand for the payment of this tax on or before February 1, 1921. You also notified the executors that if they fail to pay said tax on or before February 1, 1921, you intend to seize and sell property belonging to the estate under warrant of distress and impose penalties and pains for the non-payment thereof.

The und rsigned subsequently, to wit, on the 25th day of January, 1921, made application to you for an extension of the time of payment of the tax until December 2, 1921. Subsequently, to wit, on the 4th day of March, 1921, you notified us that an extension of time for the payment of said tax had been granted to May 31, 1921, conditioned on the immediate payment of $1,584,724.67, and on May 4, 1921, the executors paid you the said sum of $1,584,724.67, being twenty-five per cent of the tax which had been assessed by you.

14 For the purpose of avoiding the imposition of penalties and interest, as well as the threatened seizure and sale of property under warrant of distress and other pains and penalties for the non-payment thereof, the undersigned, executors of the last will and testament of Henry C. Frick, deceased, hereby make payment of the residue of the tax as assessed, to wit, the sum of $4,754,174.01, under protest, on the ground that the said requirement of the payment of the whole of said tax and of certain specific portions thereof, and the imposition of the penalty and interest prescribed for failure to make said payment, are illegal, for the following reasons, among others:

1. That the whole of said tax so assessed as aforesaid is illegal, because Title IV of the revenue act of 1918 and all other laws under which the tax might be imposed are in violation of the Constitution of the United States and null and void.

2. So much of the said tax as consists of a levy (which the undersigned believe to be at the rate of twenty-five per cent) on the amount receivable in excess of $40,000 by beneficiaries, other than the executors, as insurance upon policies taken out by the decedent upon his own life, which is attempted to be levied under section 402 of the revenue act of 1918, is illegal; the aggregate amount received under said policies is $474,629.52.

Said tax so imposed is illegal and void, being in violation of the Constitution of the United States and constituting, among other things, an attempt to levy an inheritance tax upon property which did not belong to the decedent's estate and which is, in fact, a tax upon property belonging to and vested in the beneficiaries named in said policies and not received by them under any succession, in-

heritance, or transfer laws of the State of Pennsylvania or any other State or of the United States.

3. In the assessment of said tax there is no deduction for certain debts of the estate. As there has not yet been any adjudication as to the indebtedness of said estate, it is impossible at the present time for the undersigned to designate specifically how much the total indebtedness of said estate will amount to; and in so far as said assessment is excessive by reason of the failure to deduct the total amount of the debts of the estate, the undersigned claim that the said assessment is illegal and void.

4. In making said assessment there is no deduction made of succession, inheritance or transfer taxes paid to the State of Pennsylvania, and other States, and to that extent the said assessment is illegal and void.

5. All other and further grounds of objection to said tax, and each and every part thereof, are hereby reserved.

15 The undersigned hand you herewith their check for $2,562,077.67 and United States Government bonds, held by the decedent for six months prior to his death and bearing interest at a higher rate than 4% of the par value of $2,180,500.00 and having accrued interest thereon to May 31, 1921, amounting to $11,596.34. The aggregate of said check and the par value of said bonds and accrued interest thereon amount to $4,754,174.01, being the amount of tax assessed by you less the payment heretofore made. This payment is made under compulsion and duress and without prejudice to the rights of the undersigned. The undersigned hereby make demand for the return of the total amount of the tax paid and hereby notify you that, in the event of your failure to return the said amount, suit will be entered against you for the recovery of the same and of each and every part or item thereof which has been erroneously or illegally assessed.

Dated at Pittsburgh, Pennsylvania, the 31st day of May, 1921.

ADELAIDE H. C. FRICK,
HELEN C. FRICK,
CHILDS FRICK,
HENRY C. McELDOWNEY,
WILLIAM WATSON SMITH,
Executors of the Last Will and Testament of Henry C. Frick.

By H. C. McELDOWNEY,
WILLIAM WATSON SMITH.

16 [Omitted in printing.]

17 **EXHIBIT C TO STATEMENT OF CLAIM**

CLAIM FOR REFUND

Treasury Department. Internal Revenue Service. Form 46—Revised Jan. 1921. Ed. 200,000.

Taxes erroneously or illegally collected. Also amounts paid for stamps used in error or excess.

Date of filing to be plainly stamped here.

IMPORTANT

This claim should be forwarded to the collector of internal revenue to whom the tax was paid and must be accompanied by collector's receipt therefor.

STATE OF PENNSYVANIA,
County of Allegheny, ss:

Name of claimant: (Write name so it can be easily read.) Adelaid H. C. Frick, Helen C. Frick, Childs Frick, Henry C. McEldowny, and William Watson Smith, executors of the last will and testament of Henry C. Frick, deceased; by William Watson Smith.

Address of claimant: (Give street and number, as well as city or town and State.) 1924 Frick Building, Pittsburgh, Pennsylvania.

This deponent being duly sworn according to law deposes and says that this claim is made on behalf of the claimants named above, and that the facts stated below with reference to the claim are true and complete:

1. Business engaged in by claimant: ----------
2. Character of assessment or tax: Federal estate tax under war revenue act of 1918.

(State for or upon what the tax was assessed or the stamps affixed.)

3. Amount of assessment---------- $6,338,898.68
4. Amount now asked to be refunded (or such greater amount as is legally refundable)---------- 108,657.38
5. Date of payment of assessment: May 4, 1921.
May 31, 1921.

Deponent verily believes that the amount stated in item 4 should be refunded and claimant now asks and demands refund of said amount for the following reasons:

The amount stated in item 4, $108,657.38, is the amount of the Federal estate tax paid on the amount of insurance upon policies taken out by the decedent upon his own life and payable to beneficiaries specifically designated, other than the executors, in excess of $40,000, said policies aggregating in amount $474,629.52.

18 Said tax, imposed under section 402 of the revenue act of 1918, is illegal and void, being in violation of the Constitution of the United States and constitutes, among other things, an

attempt to levy an inheritance tax upon property which did not belong to the decedent's estate and is in fact a tax upon property belonging to and vested in the beneficiaries named in said policies and not received by them under any succession, inheritance or transfer laws of the State of Pennsylvania or any other State, or of the United States.

The claimants herein file this claim for refund without prejudice to their right, which is hereby specifically reserved, to file such other and further claims for refund by reason of the payment of the Federal estate tax levied and imposed upon the estate of Henry C. Frick, deceased, or any part thereof, which has heretofore been paid under protest or with respect to which the claimants may be entitled to a refund.

And this deponent further alleges that the said claimants are not indebted to the United States in any amount whatever, and that no claim has heretofore been presented, except as stated herein, for the refunding of the whole or any part of the amount stated in item 3.

(Signed) WILLIAM WATSON SMITH,
(WILLIAM WATSON SMITH)
One of the executors of the Last Will and
Testament of Henry C. Frick, Deceased.

Sworn to and subscribed before me this 29th day of December, 1921.

CLARA I. HOUSTON,
Notary Public.

(N. P. Seal.)
My commission expires January 22, 1925.

(This affidavit may be sworn to before a deputy collector of internal revenue without charge.)

19 EXHIBIT D TO STATEMENT OF CLAIM

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, January 23, 1922.

Address reply to Commissioner of Internal Revenue and refer to ET-330-CLR-MR, District of 23rd Pennsylvania. Estate of Henry Clay Frick.

WILLIAM WATSON SMITH,
Executor Estate of Henry Clay Frick,
1924 Frick Building, Pittsburgh, Pennsylvania.

SIR: The bureau has examined the claim filed by you, as executor of the estate of Henry Clay Frick, for refund of $108,657.38, Federal estate tax paid under the revenue act of 1918.

The amount claimed is stated to be the tax upon the value of insurance in excess of $40,000, payable to specific beneficiaries. The insurance was included in the gross estate by reason of section 402 (f) of the revenue act of 1918, which reads as follows:

"That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated.

"To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life."

It is alleged that the revenue act of 1918, in so far as it attempts to levy a tax upon the insurance policies covered by the claim, is in violation of the Constitution of the United States.

Inasmuch as the policies of insurance were included in the gross estate by reason of the express provisions of the estate tax law, in effect on the date of decedent's death, and since the function of this bureau is to administer the revenue laws enacted by Congress and the commissioner is not authorized to favorably entertain any claim which is based upon the alleged unconstitutionality of such laws, it is necessary to reject your claim for refund of $108,657.38 in its entirety, which is hereby done.

Respectfully,

D. H. BLAIR, *Commissioner.*

AMG

20 In United States District Court

Motion and order to amend statement of claim

(Filed Nov. 26, 1923)

And now, to wit, November 26, 1923, come the plaintiffs, by their counsel, and move to amend the plaintiff's statement in this case by adding to paragraph (11), at the end thereof, the following: "also because said tax is a direct tax, in violation of Article I, section 9, subdivision 4, of the Constitution of the United States; also that the levy and collection of said tax was illegal because the said act is not retroactive and does not authorize the imposition of the tax, by reason of which this suit is brought."

ADELAIDE H. C. FRICK ET AL.,
By GEORGE B. GORDON,
Their Attorney.

ORDER OF COURT

And now, November 26, 1923, the plaintiffs' statement in this case is amended as prayed for.

PER CURIAM.

[File indorsement omitted.]

21 In United States District Court

Affidavit to defense

(Filed Dec. 6, 1922)

Now comes C. G. Lewellyn, formerly collector of internal revenue for the twenty-third collection district of Pennsylvania, and says that he has a full, just, true, complete, and legal defense to the whole and every part of the claim of the plaintiffs, as contained in their statement heretofore filed in the above entitled case, which defense is as follows, to wit:

First. The averments of paragraph one of plaintiffs' statement of claim are admitted.

Second. The averments of paragraph two of plaintiffs' statement of claim are admitted.

Third. The averments of paragraph three of plaintiffs' statement of claim are admitted.

Fourth. The averments of paragraph four of plaintiffs' statement of claim are admitted.

Fifth. The averments contained in paragraph five of plaintiffs' statement of claim are admitted, except that defendant denies
22 that the levy and collection from plaintiffs of state tax amounting to $108,657.38 by the defendant, as United States collector of internal revenue for the 23rd district of Pennsylvania, was made erroneously and unlawfully, but avers, on the contrary, that said levy and collections of the said tax were made strictly according to law.

Sixth. The averments of paragraph six of plaintiffs' statement of claim are admitted.

Seventh. The defendant admits the averments contained in the first sentence of paragraph seven of the plaintiffs' statement of claim, and admits that the payment of the sum of $4,754,174.01 was made involuntarily, but alleges that the payment of the $1,584,724.67, made on May 4, 1921, was made voluntarily, and not under protest. The other allegations contained in paragraph seven are admitted.

Eighth. The averments contained in paragraph eight of plaintiffs' statement of claim are admitted.

Ninth. The averments contained in paragraph nine of plaintiffs' statement of claim are admitted.

Tenth. The averments of paragraph ten of plaintiffs' statement of claim are admitted, except that it is denied that the polices referred to in this paragraph became vested in the several beneficiaries in the decedent's lifetime. Defendant also denies the allegations that these policies are not part of the estate or property which the decedent left at his death, and were not liable for the payment of his debts or distributable as part of his estate. Defendant also denies that the beneficiaries received the proceeds of said policies solely by reason of their ownership thereof. In answer thereto, the defend-

ant avers that the beneficiaries received the proceeds of the said insurance policies by virtue of the succession, inheritance and transfer laws of the State of Pennsylvania, of other States of the United States and of the United States.

23 Eleventh. Defendant denies the allegations of paragraph eleven, and alleges that the provisions of subdivision (f) of section 402 of the revenue act of 1918, requiring the plaintiffs, in computing estate tax, to include in the gross estate of the decedent the excess over $40,000 of the proceeds of the eleven life-insurance policies designated in Schedule 1 attached to the statement of claim, are constitutional.

Twelfth. Defendant admits that no part of said sum of $108,657.38 had been repaid to the plaintiffs. Defendant denies the allegations that the amount of $108,547.38, with interest thereon from May 31, 1921, remains due and owing from the defendant to the plaintiffs.

Thirteenth. The averments of paragraph thirteen of plaintiffs' statement of claim are admitted.

Fourteenth. As to the averments of Schedule 1 attached to plaintiff's statement of claim and made a part thereof, defendant is uninformed, makes denial thereof and demands strict proof of same, if material.

WALTER LYON,
U. S. Attorney.
WARREN H. VAN KIRK,
Spec. Asst. U. S. Attorney,
Attorneys for Defendant.

[Jurat showing the foregoing was duly sworn to by C. G. Lewellyn; omitted in printing.]

24 PLF'S.

11/26/23. L. D. S.

In the District Court of the United States for the Western District of Pennsylvania

ADELAIDE H. C. FRICK, HELEN C. FRICK, Childs Frick, H. C. McEldowney, and William Watson Smith, Executors of the Last Will of Henry C. Frick, Deceased vs. C. G. LEWELLYN, FORMERLY COLLECTOR OF United States Internal Revenue for the Twenty-third District of the State of Pennsylvania	No. 2831. November Term, 1922

STIPULATION AS TO FACTS

It is stipulated and agreed that the following shall be taken for the purpose of this case to be a correct statement of facts, provided, however, that this stipulation shall not be taken to prevent either

of the parties hereto from introducing additional evidence at the trial of the cause if said evidence does not contradict, or tend to contradict, the facts herein agreed to, and provided further that objection may be made at the trial to the relevancy of any of the stipulated facts.

First. The copies of the insurance policies hereto attached, copies of the assignments of such policies, copies of the designation of beneficiaries under said policies, copies of the claims made by the beneficiaries, copies of the checks or vouchers of the various insurance companies making payments of said policies hereto attached are true and correct copies of said respective documents and may be used at the trial of this case in lieu of the originals.

25 Second. On December 2, 1919, one Henry C. Frick, a resident of the State of Pennsylvania, died in the city of New York, leaving a last will and testament, which was duly admitted to probate by the register of wills of Allegheny County, Pennsylvania, on December 6, 1919. Letters testamentary were duly issued to Adelaide H. C. Frick (the widow of the decedent), Helen C. Frick, Childs Frick, H. C. McEldowney, and William Watson Smith, who duly qualified as executors under the decedent's will.

Third. On December 2, 1920, the aforesaid executors, pursuant to the provisions of the revenue act of 1918, made their return for Federal estate tax to C. G. Lewellyn, who was at that time internal revenue collector for the twenty-third district of Pennsylvania. This return was duly verified by oath.

Fourth. Prior to his death, the decedent had entered into contracts of life insurance with various insurance companies. The following schedule shows the pertinent terms of the various policies, together with the details of the payments of premiums and the nature of the settlements by which the various policies were liquidated. These abstracts, however, are not to be considered as conclusive, but are subject to correction and explanation by reference to the exhibits referred to in the first paragraph:

1. Nederland Life Insurance Co., Ltd.—No. 54105; dated May 31, 1895; $20,000.

This policy is a non-participating ordinary life policy, and is payable to "Henry Clay Frick, the insured, executors, administrators, or assigns."

The policy is endorsed:

"At the written request of the insured under the within policy #54105, the amount insured is hereby made payable to Helen Clay Frick, daughter of the insured, or if she shall not then be living, to the insured's executors, administrators, or assigns."

The assignment from the decedent to Helen Clay Frick is dated June 22, 1917.

Premiums were paid as follows:

1895–1899 (@ $377.80)	$1,889.00
1900–1919 (@ $715.60)	14,312.00
	16,201.00

This policy was liquidated by the payment of the face value, $20,000. The rate at which interest must be compounded on annual payments of $377.80 for five years and thereafter $715.60 for twenty years in order that the principal sums plus interest shall amount to $19,999.50 is 1.781%.

2. Mutual Life Insurance Company of New York—No. 163109; dated December 19, 1874; $10,000.

This is an ordinary life policy, and is payable to "the assured, his executors, administrators, or assigns." On April 21, 1882, the assured executed the following assignment:

"For one dollar, to me in hand paid, and for other valuable considerations (the receipt of which is hereby acknowledged), I hereby assign, transfer, and set over to Ada H. C. Frick (wife) of Pittsburgh, Pa., all my right, title, and interest in this policy No. 163109 issued by the Mutual Life Insurance Company of New York, and for the consideration above expressed I do also for myself, my executors and administrators, guarantee the validity and sufficiency of the foregoing assignment to the above-named assignee, her executors, administrators, and assigns, and their title to the said policy will forever warrant and defend.

"Dated in Pittsburgh this 21st day of April, 1882.

"In presence of— H. C. FRICK."

M. M. BOSWORTH.

26 In its fifth paragraph the policy provides:

"In every case when this policy shall cease and determine, or become or be null and void, all payments thereon shall be forfeited to this Company, except that in case of the death of the insured by his own act or hand the Company will return the premiums paid."

Premiums were paid as follows:

1874–1890 (@ $198.90, less cash dividend of $389.08)	$2,992.22
1891–1918 (@ $198.90)	5,569.20
	8,561.42

The policy was liquidated as follows:

Face	$10,000.00
Additional insurance purchased with $2,810.53 dividends	5,074.00
Post-mortem dividend	128.28
	15,202.28

The rate at which interest must be compounded on annual payments of $198.90 for forty-five years, in order that the principal sums plus interest shall amount to $15,202.28 is 2.16%.

3. Berkshire Life Insurance Company—No. 31580; dated March 18, 1890; $20,000.

This is an ordinary life policy and is payable to the "Executors, administrators, or assigns" of Henry C. Frick.

The policy contains the following deferred dividend clause:

"Conditions referred to in this policy.—Dividends.—That at the expiration of each period of five years, from the date of this policy, it shall, if then in force, be credited with its share of the distributive

surplus of the company as determined and apportioned by its board of directors. Such share shall be applied by the company in the purchase of additional insurance upon the person whose life is insured by this policy, payable when the policy becomes due. This additional insurance may be surrendered, and upon due acquittance being made, the cash value thereof will be paid, or it may be applied to the reduction of the premiums. If the death of the insured should occur after a distribution of surplus to this policy, and before the next period of five years has expired, a post-mortem dividend will be paid with the policy. No other distributions of surplus shall be made on account of this policy."

27 The policy is endorsed:

"Policy No. 31580.

"In consideration of one dollar, love and affection, I do hereby assign all my right, title, and interest in policy number 31580 issued by the Berkshire Life Insurance Company of Pittsfield, Mass., insuring the life of Henry C. Frick, of Pittsburgh, Pa., including all dividends and dividend additions or accumulations accrued or to accrue on said policy (reserving and excepting, however, to the assured the right to apply the cash value of any dividends or dividend additions or accumulations in payment of premiums hereafter due on said policy) unto my daughter, Helen Clay Frick, if she survives me; otherwise to my executors, administrators, or assigns.

HENRY CLAY FRICK."

The assignment to Helen Clay Frick is dated June 19, 1917.

Premiums were paid as follows:

1890-1919 (@ $632.00)	$18,960.00

This policy was liquidated as follows:

Face	$20,000.00
Additional insurance purchased with $3,866 dividends	7,080.00
Post-mortem dividend	763.60
	27,843.60

4. State Mutual Life Assurance Company—No. 23135; dated March 18, 1890; $20,000.

This is an ordinary life policy and is payable to the "executors, administrators, or assigns" of Henry C. Frick.

The policy provides that:

"The State Mutual Life Assurance Company of Worcester, Mass., hereby agrees to give, in accordance with the provisions of the laws of Massachusetts, on any anniversary of this policy at the end of two full years from the date thereof the cash surrender, or paid-up values herein below stated, any indebtedness to the company on account of this policy being first deducted therefrom."

The policy is endorsed:

"The insured under date of June 19, 1917, nominates his daughter,

28 Helen Clay Frick, as beneficiary under this policy, but only in the event of the decease of the said insured prior to that of said beneficiary; with the express provision, however, that if

the said insured shall survive the said beneficiary, or shall be living at the expiration of the endowment period (if such period is named in the policy) then this policy and all rights thereunder shall revert to said insured. The foregoing nomination is made subject to any existing assignment of this policy."

Premiums were paid as follows:

1890–1919 (@ $632.00)	$18,960.00

The policy was liquidated as follows:

Face	$20,000.00
Additional insurance purchased with $5,361.87 dividends	8,711.00
Final dividend	255.60
	28,966.60

5. Connecticut Mutual Life Insurance Company—No. 190366; dated March 21, 1890; $50,000.

This is an ordinary life policy with provisions for limited cash surrender value payments and for paid-up insurance.

It is provided that the face value of the policy is "to be paid to his legal representatives," referring to Henry C. Frick.

The policy is endorsed:

"In consideration of love and affection I hereby assign, transfer, and set over to Helen Clay Frick, my daughter, Penn & Homewood Avenues, Pittsburgh, Pa., policy No. 190366 of the Connecticut Mutual Life Insurance Company upon my life, except that if I shall survive such assignee all right, title, and interest therein shall revert to me; expressly reserving, however, to myself the right to use or collect during my life time any and all dividends and profits due or to become due on said policy, and further reserving a right to personally revoke this assignment by filing with said company, at its home office in Hartford, Connecticut, a written revocation hereof."

The assignment to Helen Clay Frick is dated June 19, 1917.

29 Premiums were paid as follows:

1890–1919 (@ $1,547)	$46,410.00

This policy was liquidated as follows:

Face	$50,000.00
Dividends with interest thereon	21,286.76
	71,286.76

6. Mutual Benefit Life Insurance Company—No. 158055; dated April 7, 1890; $10,000.

This is an ordinary life policy, with the usual non-forfeiture provisions. This policy is payable to "Henry Clay Frick, his executors, administrators, or assigns."

The policy is endorsed:

"In conformity with request of insured, copy of which is hereto attached, this policy is hereby made payable to Helen C. Frick, daughter of the insured, in case she survives the insured. Otherwise to the said insured, his executors, administrators, or assigns."

The assignment to Helen C. Frick is dated June 19, 1917.

Premiums were paid as follows:

1890–1919 (@ $308.40)	$9,252.00

This policy was liquidated as follows:

Face	$10,000.00
Additional insurance purchased with $2,008.84 dividends	4,821.00
Final dividend	188.67
	15,009.67

7. Equitable Life Assurance Society of the United States—No. 164814; dated November 23, 1901; $114,000.

This policy is a paid-up policy, issued in consideration of the surrender of policy No. 335187, dated November 23, 1886, face value $50,000 (a matured fifteen-year endowment policy), and the dividend accumulation thereon amounting to $10,426.00.

This policy is payable to "Ada H. C. Frick if living, if not, then her husband, Henry C. Frick, his executors, administrators, or assigns."

Policy No. 164814 was liquidated by the payment of
30 $114,000, being paid-up insurance purchased as follows:

Proceeds of endowment policy 336187 (matured 1901)	$50,000
Dividend accumulations on same	10,426
Total cost	60,426

On endowment policy 336187 premiums had been paid as follows:

1886–1901 (@ $3,420.50)	$51,307.50

8. Equitable Life Assurance Society of the United States—No. B–294284; dated March 17, 1885; $50,000.

This is an ordinary life policy, with a fifteen-year tontine deferred dividend provision and a special provision for conversion into paid-up insurance.

The policy is payable to "Ada H. C. Frick, if living; if not, then her husband, Henry C. Frick, his executors, administrators, or assigns."

Premiums were paid as follows:

1885–1899 (@ $1,565)	$23,475.00

This policy was liquidated as follows:

Face	$50,000.00
Additional insurance purchased March 17, 1891, with $7,924.50 dividends	15,600.00
Additional insurance purchased after 1900 with $8,748.01 dividends	12,064.00
Post-mortem dividend	380.01
	78,044.01

9. New York Insurance Company—No. A–103932; dated February 2, 1874; $10,000.

This is an ordinary life policy, with provisions for twenty-year deferred tontine dividends.

The policy provides that after the completion of the tontine period, the assured may apply the accumulated dividend to the purchase of a life annuity, may withdraw the accumulated dividend in cash, withdraw the annuity in cash, or convert the dividend into paid-up insurance.

31 The policy is payable to "Henry Clay Frick's legal representatives." On April 22, 1882, the assured executed the following assignment:

"For value received I hereby assign and transfer unto my wife, Ada H. C. Frick, of Pittsburgh, Penna., the policy of insurance known as No. 103932, issued by the New York Life Insurance Company upon the life of Henry Clay Frick, of Pittsburgh, Pa., and all dividend, benefit, and advantage to be had or derived therefrom, subject to the conditions of the said policy, and to the rules and regulations of the company.

"Witness my hand and seal, this 22nd day of April, (1882) one thousand eight hundred and eighty-two.

HENRY CLAY FRICK."

Premiums were paid as follows:

1874–1919 (@ $198.90)	$9,149.40

This policy was liquidated as follows:

Face	$10,000.00
Dividends, 1895–1919	3,472.00
Post mortem dividend	109.80
	13,581.80

10. New York Life Insurance Company—No. 497958; dated December 22, 1892: $65,000.

This is an ordinary ten-payment life policy with a twenty-year deferred dividend provision. The policy provides that after the accumulation period the assured may receive the accumulated dividend in cash, or may apply it to purchase an annuity, or additional paid-up insurance; or he may exchange the policy (together with the accumulated dividend) for cash, for a life annuity, or for a paid-up policy. The policy prevents forfeiture for non-payment of premiums by providing for extended insurance or conversion into paid-up insurance.

The policy is payable to "the insured's executors, administrators, or assigns." On June 19, 1917, the assured executed the following assignment:

32 "For value received I, being of legal age, hereby assign and transfer unto Helen Clay Frick of Penn & Homewood Aves., Pittsburgh, Pa., the policy of insurance known as No. 497,958 issued by the New York Life Insurance Company upon the life of Henry C. Frick, of Pittsburgh, Pa., and all dividend, benefit and advantage to be had or derived therefrom, subject to the conditions of the said policy,

and the rules and regulations of the company, provided that in the event of the prior death of the said Helen Clay Frick this assignment is null and void and of no effect. The right to revoke this assignment at any time upon written notice to the New York Life Insurance Company is hereby reserved.

"Witness my hand and seal this 19th day of June, nineteen hundred seventeen.

HENRY C. FRICK."

Premiums were paid as follows:

1892–1901 (@ $4,244.50)	$42,445.00

This policy was liquidated as follows:

Face	$65,000.00
Post-mortem dividend	501.80
	65,501.80
Deferred dividends paid in cash in 1912 amounted to	11,736.40
Cash dividends (1913–1918) paid in 1918 amounted to	2,863.25
	14,599.65

Of the cash dividends mentioned Miss Frick received $1,007.80, being the dividends paid after the assignment of the policy.

11. New York Life Insurance Company—No. 501052; dated December 29, 1892; $25,000.

This is an ordinary ten-payment life policy, with a twenty-year deferred dividend provision.

The policy provides that after the accumulation period the assured may receive the accumulated dividend in cash, or may apply it to purchase an annuity, or in addition paid-up insurance;
33 or he may exchange the policy for cash, for a life annuity, or for a paid-up policy. The policy prevents forfeiture for nonpayment of premiums, by providing for extended insurance or conversion into paid-up insurance. The policy is payable to the "insured's executors, administrators, or assigns." On June 19, 1917, the assured executed the following assignment:

"For value received, I, being of legal age, hereby assign and transfer unto Henry Clay Frick, of Penn & Homewood Aves., Pittsburgh, Pa., the policy of insurance known as No. 501,052 issued by the New York Life Insurance Company upon the life of Henry C. Frick, of Pittsburgh, Pa., and all dividend, benefit and advantage to be had or derived therefrom, subject to the conditions of the said policy, and the rules and regulations of the company, provided that in the event of the prior death of the said Helen Clay Frick this assignment is null and void and of no effect. The right to revoke this assignment at any time upon written notice to the New York Life Insurance Company is hereby reserved.

"Witness my hand and seal, this 19th day of June, nineteen hundred seventeen.

HENRY C. FRICK."

Premiums were paid as follows:

1892–1901 (@ $1,632.50)	$16,325.00

This policy was liquidated as follows:

Face	$25,000.00
Post-mortem dividend	193.00
	25,193.00
Tontine dividend paid in 1912 amounted to	4,514.00
Cash dividends (1913–1918) paid in 1918 amounted to	1,101.25
Total	5,615.25

Of the cash dividends mentioned Miss Frick received $353.00, being the dividends paid after the assignments.

Fifth. Mr. Henry C. Frick did not in his lifetime revoke the assignments of any of said policies nor designate any beneficiaries other than those named in the designations attached hereto, or surrender said policies or obtain any loans thereon from the insurance companies or any of them.

34 The premiums on all of said policies were paid as they accrued by Henry C. Frick.

Sixth. The total amount received by the beneficiaries of the above-described insurance policies was $474,629.52. In Schedule C of their return, the executors, complying with the provisions of the revenue act of 1918, and the regulations of the Treasury Department relating thereto, included in the gross estate of the decedent the sum of $434,629.52, being the excess over $40,000 of the total amount received by beneficiaries under the above-described policies of life insurance. More than $500,000 of the net value of the estate of the decedent was taxable at the rate of 25%. By reason of the inclusion of said sum of $434,629.52, the estate tax shown to be due from the executors was increased by the amount of $108,657.38.

Seventh. On or about January 22, 1921, the internal revenue collector served on the executors notice and demand for the payment of an estate tax in the sum of $6,338,898.68. The time for the payment of this tax was, on the application of the executors, extended by the Commissioner of Internal Revenue, and on May 4, 1921, the plaintiffs paid the sum of $1,584,724.67 on account, and on May 31, 1921, the sum of $4,754,174.01, thus completing payment of the tax demanded. Said payments were made involuntarily and under protest and compulsion, and to avoid the imposition of penalties for nonpayment and the issue of warrants of distress against the property of the decedent for the collection of the tax.

35 Eighth. The life insurance companies, which issued the policies described in paragraph fourth above, have reported their surplus funds as follows:

Berkshire Life Insurance Co.*		Conn. Mutual Life Ins. Co.		Equitable Life As. Soc. U. S.		Mutual Benefit Life Insurance Co.	
1881	$128,873	1862	$1,517,702	1864	$308,976	1865	32,638,202
1871	80,740	1872	7,393,797	1874	3,432,746	1875	4,665,027
1881	424,575	1882	6,815,963	1884	13,452,242	1885	5,450,563
1891	531,444	1892	7,128,176	1894	35,575,318	1895	4,076,806
1901	821,060	1902	9,072,284	1904	80,494,861	1905	7,576,303
1906	1,120,412	1912	8,572,727	1910	8,272,647	1910	7,545,430
1911	1,624,984	1913	8,961,658	1911	7,894,117	1911	6,308,244
1912	**962,335	1914	4,333,944	1912	6,515,532	1912	5,702,118
1913	1,488,152	1915	4,426,963	1913	9,904,861	1913	5,442,663
1914	1,358,769	1916	***3,401,489	1914	10,974,744	1914	5,907,176
1915	1,235,427	1917	***3,666,132	1915	10,671,765	1915	7,395,626
1916	1,250,836	1918	***3,355,594	1916	11,614,211	1916	9,429,245
1917	1,325,741	1919	3,001,643	1917	11,745,558	1917	8,649,047
1918	1,077,249	1920	3,789,865	1918	13,026,853	1918	6,289,596
1919	1,023,017			1919	17,225,468	1919	5,456,375
1920	838,408			1920	22,428,132	1920	#12,755,420

*The foregoing figures are taken from Best's Life Insurance Reports, sixteenth annual edition, 1921 except in the case of the Nederland Life Insurance Company, Ltd., the figures for which are taken from the New York State Insurance Reports.

**The fund reserved for dividends increased $530,612.91 over preceding year.

***The following amounts, representing deferred dividends set aside—1916, $1,630,000; 1917, $1,709,000; 1918, $1,820,000; 1919, $1,710,000; 1920, $1,910,000—were carried as surplus previous to 1916.

#Basis of amortized values, New York Standard.

Mutual Life Ins. Co.		Nederland Life Ins. Co.		New York Life Ins. Co.		State Mutual Life Assurance Co.	
1823	$1,979,979	1912	$280,096.14	1865	$985,967	1856	$57,575
1873	6,745,632	1913	253,618.59	1875	5,690,507	1866	112,481
1883	12,514,111	1914	88,851.18	1885	13,215,047	1876	317,960
1893	*15,148,269	1915	83,205.93	1895	24,038,678	1886	771,080
1903	61,304,844	1916	101,092.50	1905	9,549,052	1896	1,295,819
1910	10,940,065	1917	88,249.75	1910	11,021,043	1906	2,801,335
1911	11,310,620	1918	100,079.42	1911	10,974,116	1909	3,086,486
1912	12,456,662	1919	114,139.42	1912	10,397,583	1910	3,580,789
1913	10,967,506	1920	122,927.06	1913	9,957,021	1911	3,884,769
1914	12,647,615	1921	147,989.04	1914	15,870,482	1912	3,829,331
1915	14,625,579			1915	17,597,016	1913	3,819,360
1916	16,252,739			1916	32,625,030	1914	3,184,667
1917	17,049,997			1917	41,194,201	1915	3,218,305
1918	15,741,576			1918	44,070,200	1916	3,103,793
1919	24,051,215			1919	39,919,771	1917	3,375,853
1920	25,038,413			1920	55,855,587	1918	2,786,542
						1919	2,907,657
						1920	3,290,947

*Includes deferred dividend funds.

Ninth.

The gross estate, as determined by the Commissioner of Internal Revenue on review, including the amounts paid on insurance policies in excess of $40,000, amounted to $97,532,512.46

The debts of the decedent, together with funeral expenses and administration expenses amounted to 9,902,625.58

87,629,886.86

Deduct amount of insurance policies, included 434,629.52

87,195,257.34

The total state inheritance taxes were estimated at $3,073,754.82

The Federal estate was estimated at 9,649,854.11

12,723,608.93

Leaving net assets for probate 74,472,648.41

As this sum is in excess of $108,657.38, the amount by which the estate tax was increased by the inclusion of insurance policies, there

were sufficient assets in the estate to pay the aforesaid tax. The beneficiaries under the insurance policies paid no part of said tax.

In Article VIII of the decedent's will he directed "that all inheritance, legacy, succession, or similar duties or taxes * * *
36 shall be paid out of the capital of my residuary estate." The residuary estate has been estimated to amount to $13,745,710.00 after deducting all specific bequests, the Federal estate and the state inheritance taxes.

Tenth. On or about December 29, 1921, the executors filed with the internal revenue collector a claim for the refund of $108,657.38, being that part of the estate tax resulting from the inclusion of the value of the aforesaid life insurance policies in the gross estate. This claim was rejected by the Commissioner of Internal Revenue on or about January 23, 1922.

Eleventh. No part of the said sum of $108,657.38 has been repaid to the executors.

Twelfth. On October 7, 1922, the executors commenced suit against C. G. Lewellyn, formerly internal revenue collector, as above described, to recover the sum of $108,657.38, with interest thereon from May 31, 1921, together with costs.

GEORGE B. GORDON,
Attorney for Plaintiffs.
WALTER LYON,
By WARREN H. VAN KIRK,
United States Attorney.

37–111 [Omitted in printing.]

112 In United States District Court

[Title omitted.]

Appearances

Filed Aug. 1, 1924

Appearances: Messrs. George B. Gordon, Miles H. England, John G. Buchanan, S. G. Nolin, and Frank B. Ingersoll, representing the plaintiffs; Warren H. Van Kirk, asst. U. S. atty., and Capt. H. M. Darling, representing the Solicitor for the Department of Internal Revenue.

Frederic G. Dunham, Esq., of the New York bar, was allowed to participate in the argument and file a brief as amicus curiæ.

LUCY DORSEY IAMS,
Official Reporter, U. S. Court,
Bakewell Bldg., Pittsburgh, Pa.

[File indorsement omitted.]

113 In United States District Court

[Title omitted.]

Argument of counsel

And now, Monday, November 26, 1923, the above matter came on to be heard before Hon. W. H. S. Thomson, judge, without a jury.

Appearances: Messrs. George B. Gordon, Miles H. England, John G. Buchanan, S. G. Nolin, and Frank B. Ingersoll, representing the plaintiffs; Warren H. Van Kirk, asst. U. S. atty., and Capt. H. M. Darling, representing the Solicitor for the Department of Internal Revenue.

Frederic G. Dunham, Esq., of the New York bar, was allowed to participate in the argument and file a brief as amicus curiæ.

Mr. Gordon on behalf of the plaintiffs opened the case by stating the nature of the litigation.

114 Counsel for plaintiffs move to amend the plaintiffs' statement of claim by adding at the end of paragraph 11 the following:

"also because said tax is a direct tax, in violation of Article I, section 9, subdivision 4 of the Constitution of the United States; also that the levy and collection of said tax was illegal because the said act is not retroactive and does not authorize the imposition of the tax, by reason of which this suit is brought."

Mr. Gordon. I understand, your Honor, that counsel representing the United States say that they are scarcely prepared this morning to argue the question as to the construction of the act. We can file briefs later; but of course I will also be glad to meet Mr. Darling and argue that question separately at a later date, if he desires.

Mr. Darling. Your Honor, the pleading alleges that the act is not constitutional, and we are prepared on that side of the case; but this proposed amendment raises the question of whether or not the words of the act are retroactive. I will be very glad to say what I have to say on that point this morning, but wish to reserve the right to file a brief on that particular subject later and perhaps orally argue the question.

115 Motion to amend allowed.

Counsel for plaintiffs offer in evidence such portions of the statement of claims as are admitted by the affidavit of defense, as follows:

"(1) Of the plaintiffs, Adelaide H. C. Frick, Helen C. Frick, H. C. McEldowney, and William Watson Smith are citizens of Pennsylvania and have their domicile and residence in the city of Pittsburgh in the western district of Pennsylvania. The said Childs Frick is a citizen of New York and has his domicile and residence at Roslyn, Long Island, in the southern district of New York.

"(2) C. G. Lewellyn, the defendant in this case, is a citizen of the State of Pennsylvania, a resident of the city of Uniontown in the western district of Pennsylvania and, at the time of the committing of the grievances hereinafter mentioned and until the 1st day of August, 1921, was the collector of the United States internal revenue for the twenty-third district of the State of Pennsylvania.

Said internal revenue district comprises within its boundaries
116 said city of Pittsburgh, which was the place of the last domicile and residence hereinafter mentioned of Henry C. Frick, deceased.

"(3) Henry C. Frick died on December 2, 1919, having his domicile and residence at the time of his death in the city of Pittsburgh in the western district of Pennsylvania and the twenty-third internal revenue district of Pennsylvania, leaving a last will and testament, which was duly admitted to probate by the register of wills of Allegheny County, Pennsylvania, on December 6, 1919. Letters testamentary were duly issued to the plaintiffs above named, who duly qualified as executors of the will of said Henry C. Frick, deceased.

"(4) On December 2, 1920, the plaintiffs, pursuant to the requirements of the United States revenue act of 1918, duly made a return for Federal estate tax of the estate of said Henry C. Frick, deceased, to the defendant as internal revenue collector for the twenty-third district of Pennsylvania. Said return was made in duplicate on Form 706 (revised November, 1919) and was duly verified by the oath of H. C. McEldowney, one of the executors."

All of the fifth paragraph with the exception of the words "erroneously and unlawfully," said paragraph then reading as follows:

"(5) In Schedule C of said return the executors, complying with the requirements of the United States revenue act of 1918 and the regulations of the Treasury Department, listed as assets of the estate of Henry C. Frick, deceased, the excess over $40,000 of the total amount received by beneficiaries other than the executors of eleven policies of life insurance on the life of said Henry C. Frick, deceased. The names of the companies issuing said policies, the policy numbers, the names of the beneficiaries at the time of decedent's death, and the respective amounts received by said beneficiaries are all set forth in Schedule 1, hereto attached and made part hereof. In said schedule are set forth also the dates of the original issues of the policies, the names of the original beneficiaries, and the substitutions of new beneficiaries in the instances where such substitutions were subsequently made. The total amount received by the
beneficiaries of said policies was $474,629.52. The total
117 amount of said insurance payable to beneficiaries other than the executors in excess of $40,000 was $434,629.52. On said sum of $434,629.52 the defendant, as collector of the United States internal revenue for the twenty-third district of Pennsylvania, levied and collected from the plaintiffs an estate tax amounting to $108,657.38 against the Estate of Henry C. Frick, deceased, as hereinafter set forth.

"(6) On or about January 22, 1921, the defendant, as collector of the United States internal revenue for the twenty-third district of Pennsylvania, claiming to act in pursuance of the provisions of the United States internal revenue act of 1918, served a notice and demand for payment on the plaintiffs of an estate tax assessed by

the Commissioner of Internal Revenue against the estate of said Henry C. Frick, deceased, in the sum of $6,338,898.68. A copy of said notice and demand is attached hereto, made part hereof and marked 'Exhibit A.'

"(7) Later, in May, 1921, after the Commissioner of Internal Revenue, on the applications of the plaintiffs, had made extensions of the time of payment of said demanded tax, the plaintiffs paid the whole of said demand to the defendant, paying on May 4, 1921, the sum of $1,584,724.67 on account, and paying on May 31, 1921, the sum of $4,754,174.01, the balance of said claim in full. The plaintiffs made said payments involuntarily, under compulsion and threats of the defendant to issue warrants of distress against the decedent's property for the collection thereof, making payments also for the purpose of avoiding the imposition on the plaintiffs by the defendant of penalties and pains for the non-payment thereof, and under protest, a copy of which is hereto attached, made part hereof, and marked 'Exhibit B.'

"(8) On or about December 29, 1921, the plaintiffs made to the Commissioner of Internal Revenue a claim for refund of said estate tax of $108,657.38 assessed against decedent's estate on said life insurance policies, filing said claim for refund with D. B. Heiner, then United States internal revenue collector for the twenty-third district of Pennsylvania. A copy of the claim for refund is attached hereto, made part hereof, and marked 'Exhibit C.'

"(9) On or about January 23, 1922, the Commissioner of Internal Revenue formally rejected the plaintiff's claim for refund in its entirety and on the merits thereof. A copy of the decision of the Commissioner of Internal Revenue, dated January 23, 1922, is hereto attached, made part hereof, and marked 'Exhibit D.'"

A part of the 10th paragraph as follows:

"(10) More than $500,000 of the net value of the estate of the decedent was taxable at the rate of twenty-five per cent. Part of the said sum of $6,338,898.68 levied as the total United States estate tax on the estate of the decedent and paid by the plaintiffs as his executors consisted of the sum of $108,657.38, which was assessed, as aforesaid, at the rate of twenty-five per cent on the sum of $434,629.52, the aggregate in excess of $40,000.00 of the sums received by the beneficiaries of the life insurance policies designated in Schedule 1 hereto attached. Said life insurance policies were policies taken out by the decedent on his own life and made payable to the respective individual beneficiaries."

A part of the 12th paragraph as follows:

"(12) No part of said sum of $108,657.38 has been repaid to the plaintiffs.

"(13) This is a suit of a civil nature at common law, and the matter in controversy, exclusive of interest, exceeds the sum of $3,000; and this suit and the cause of action herein set forth arise under the Constitution and laws of the United States and under the laws of the United States providing for internal revenue."

Counsel for plaintiffs also offer in evidence the schedules which are referred to in the parts of the affidavit of claim which have been offered in evidence.

Counsel for plaintiffs also offer in evidence a stipulation as to the facts in this proceeding, which, for the purpose of identification is marked as "Plaintiff's Exhibit No. 1," of this date.

Plaintiffs rest.

Oral arguments heard. Briefs to be filed.

121 In United States District Court

Reporter's certificate

I hereby certify that the foregoing is a correct transcript of the proceedings had before the court on Monday, November 26, 1923, in the matter of Adelaide H. C. Frick et al. vs. C. G. Lewellyn, collector of United States internal revenue for the twenty-third district of the State of Pennsylvania, at No. 2831 November term, 1922.

LUCY DORSEY IAMS,
Official Reporter.

122 In United States District Court

Judge's certificate

I, W. H. S. Thomson, judge of the District Court of the United States for the Western District of Pennsylvania, do hereby certify that the foregoing is a true transcript of the proceedings had before me on Monday, November 26, 1923, in the matter of Adelaide H. C. Frick et al. vs. C. G. Lewellyn, collector of United States internal Revenue for the twenty-third district of the State of Pennsylvania, at No. 2831 November term, 1922.

W. H. S. THOMSON, *Trial Judge.*

123 In United States District Court

[Title omitted.]

Stipulation waiving jury trial

(Filed June 28, 1923)

The parties to the above-entitled case hereby waive a trial by jury.

GEORGE B. GORDON,
Attorney for Plaintiff.
WALTER LYON, *U. S. Atty.*
By WARREN H. VAN KIRK,
Special Asst. U. S. Atty.,
Attorney for Defendant.

Dated June —, 1923.
[File indorsement.]

124 In United States District Court

[Title omitted.]

Opinion

(Filed June 5, 1924)

THOMSON, *J.:*

The executors of the will of Henry C. Frick have brought this action against the collector of internal revenue for the 23d district of Pennsylvania to recover the sum of $108,657.38, alleged to have been erroneously assessed and collected under the provisions of section 402 (f) of the revenue act of 1918. The case was tried without a jury, on an agreed statement of facts, and the facts so stipulated are adopted as the court's findings of fact, as fully as if set forth in this opinion.

At the time of testator's death there were outstanding eleven policies of insurance upon his life, four of which were payable to his wife and seven to his daughter. The aggregate amount of these policies, which was payable to, and received by, the respec-
125 tive beneficiaries was $474,629.52. This amount, less $40,000, was included in the gross estate of the decedent, which, exceeding ten million dollars in amount, exclusive of the insurance, the tax rate of twenty-five per cent became applicable under the statute, and the additional tax assessed to the estate on account of this insurance was $108,657.38, the amount sought to be recovered here. The policies in question were taken out by the decedent at various times, the first in 1874, and the last in 1901, their issuance in this way varying in time from eighteen to forty-four years before his death.

The policies were of different classes. Some were made payable to Mr. Frick's estate, with no provision for change of beneficiaries, but were subsequently assigned to his wife and daughter, without reservation of power to revoke the assignment. Some were of like character, and were so assigned, with power reserved to revoke the assignment. Some were made payable to Mr. Frick's executors, and subsequently by arrangement with the company were made payable to his daughter as beneficiary, without power reserved further to change the beneficiary. In others the wife and the daughter were named as beneficiaries, the policies containing no power which enabled the insured to change the beneficiary. All the premiums were paid by Mr. Frick, and none of the assignments of the policies so made by him were at any time revoked. The decedent died testate on December 2d, 1919, the will providing "that all inheritance, legacy, succession, or similar duties or taxes * * * shall be paid out of the capital of my residuary estate." The tax was levied
126 under Title IV of the revenue act of 1918, which went into effect on February 25th, 1919. The parts of the act material in the determination of this question are as follows:

In section 401—

"A tax equal to the sum of the following percentages of the value of the net estate (determined as provided in Section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States:

"1 per centum of the amount of the net estate not in excess of $50,000;

"* * * (Here follow the graduated rates and amounts from $50,000 up to $10,000,000) * * *:

"25 per centum of the amount by which the net estate exceeds $10,000,000."

In section 402:

"That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

"(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate:

"(b) To the extent of any interest therein of the surviving spouse, existing at the time of the decedent's death as dower, courtesy, or by virtue of a statute creating an estate in lieu of dower or courtesy:

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, whether such transfer or trust is made or created before or after the passage of this Act, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

127 "(d) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent;

"(e) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a bona fide sale for a fair consideration in money or money's worth; and

"(f) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life;

and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life."

In section 408:

"If any part of the gross estate consists of proceeds of policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds in excess of $40,000 of such policies bear to the net estate. If there is more than one such beneficiary, the executor shall be entitled to recover from such beneficiaries in the same ratio."

Aside from the provision of the will for the payment of the taxes from the residuary estate, and assuming the act valid, and giving to it the interpretation claimed for it by the Government, of the total sum of $108,657.38, eighty-nine per cent thereof would fall on the beneficiaries of the policies, and eleven per cent on Mr. Frick's estate. In other words, the act undertakes to impose a transfer tax, ascertained by including in the gross estate the amounts which
128 the executors never received, and were not entitled to receive, but which were received by his wife and daughter as insurance upon his life. This tax, by whatever name designated, is a graduated tax, and levied, not upon the value of that which the beneficiaries received, which under the act would have been two per cent, but upon the value of the decedent's total estate, which, as it exceeded ten millions of dollars, fixed the tax at twenty-five per cent.

The plaintiffs claim that the tax thus imposed is invalid, and the decision of this question involves the proper construction of the act and the question of its constitutionality.

As to the construction of the act: It is perfectly clear that the taxes in question, under section 401, are imposed upon the value of the net estate of the decedent, and their amount equals the sum of certain percentages of the value of such net estate, varying from one per cent, when the amount of the net estate is not in excess of $50,000, to twenty-five per cent of the amount by which the net estate exceeds ten millions of dollars. The value of this net estate is determined in section 403; that is, by deducting from the value of the gross estate, certain amounts therein designated and specified. The value of the gross estate is determined in section 402; that is, by including the value, at the time of the death, of all property, real or personal, tangible or intangible, wherever situated, to the extent of the interest and property specified in paragraphs (a) to (f) inclusive. Paragraph (a) refers to such interest of the decedent at the time of his death in any property which is subject to the payment of charges and expenses of administration, against his
129 estate and is subject to distribution as part of his estate; paragraph (b) refers to the inchoate interest of the surviving spouse in any property which becomes complete on the death; para-

graph (c) refers to property transferred or trust created in contemplation of death; paragraph (d) to decedent's interest in lands held jointly; paragraph (e) to property passing by will under a general power of appointment, or by deed in contemplation of death; the first part of paragraph (f) refers to insurance policies receivable by the executor, and then comes the provision in said paragraph under which the tax in question is levied, namely, "and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life."

If these words are given their ordinary meaning and significance, Congress did intend to include in the gross estate life insurance policies, which, at the time of death, formed no part of the decedent's estate, and which the executors had no right to collect. This meaning or interpretation of the act is strengthened on an examination of section 408, which provides that if any part of the gross estate consists of proceeds of policies receivable by a beneficiary other than the executor, the latter may recover from the beneficiary such portion of the total tax paid as the proceeds in excess of $40,000 of such policies bears to the net estate. In that specific case provision is made for the recoupment of the executor of the taxes which should have been paid by the designated beneficiaries. This provision does not relate to any other of the property designated in the several paragraphs of section 402. On the
130 other hand, it is provided in the same section that if the tax, or any part of it, is paid by, or collected out of, that part of the estate passing to, or in possession of, any person other than the executor, in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed, or by a just contribution by those whose interests in decedent's estate would have been reduced if the tax had been paid before distribution of the estate; the purpose of this provision being, as in said section is expressed, that so far as practicable, and unless otherwise directed by the will, the tax shall be paid out of the estate before distribution.

In short, the beneficiaries of policies on the life of the decedent, other than the executor, are made the ultimate paymasters of the taxes imposed on such policies. This is made clear, beyond question, in section 409, which provides that if decedent makes a transfer or creates a trust with respect to any property, intended to take effect in possession or enjoyment, at or after his death, or if insurance passes under a contract executed by the decedent in favor of a specific beneficiary, and in either case, if the tax in respect thereto is not paid when due, a transferee, trustee, or beneficiary is made personally liable for the tax, and such property, to the extent of the decedent's interest therein at the time of the transfer, or to the extent of such beneficiary's interest under the contract of insurance, shall be subject to a lien equal to the amount of such tax.

If this is the fair and proper meaning to be taken from the provisions of the act, when considered together, we reach the question as to the legality of the tax so imposed.

131 None of the policies passed from the decedent's estate by will, descent, or distribution; nor can it be held that any of the policies were transferred in contemplation of death within the meaning of paragraph (c) of section 402, as all transfers occurred more than two years before the decedent's death. If a transfer without consideration, within the period of two years, is deemed to be in contemplation of death, unless the contrary is shown, it would seem that a transfer prior to that time would be presumed not to have been so made, and there is nothing before the court to overthrow this presumption as to transfers of any of the policies in question.

If it be true that the policies in question, on the death of decedent, did not pass from decedent's estate by will, descent, or distribution, and that no transfer of them was made in contemplation of death, within the meaning of the act they would not be subject to a tax imposed either directly or indirectly upon the transfer of the net estate of the decedent. Congress could impose a tax on such property, but not under the guise of an excise tax. The Supreme Court in Knowlton vs. Moore (178 U. S. 41), and in other cases, has, with painstaking effort, pointed out and elaborated with great clearness the line of distinction which separates death duties, by whatever mode assessed or by whatever name designated, whether probate duties, stamp duties, legacy taxes, or estate taxes, and those taxes which are imposed on property as such because of its ownership and possession. The former may be exacted on the passing of property by will or descent as the result of death, as distinguished from a tax on the property itself. In other words, the estate

132 duty is not on the interest to which some one succeeds on the death, but the interest which ceased by reason of the death. And so have legacy and inheritance taxes been sustained, not as a tax on the property itself but upon its transmission. This because the right to take by device or descent is a legal and not a natural right, and the authority which confers it may impose conditions upon it. While the right to regulate successions is vested in the States alone, Congress has the power to levy taxes on the transmission or receipt of property, which is something apart from the right to regulate its transmission.

The amount of the net estate here made taxable under the Act, was increased by the total amount of the policies involved; with the result that the amount of the tax in dispute was imposed upon, and arose solely from, the value of these policies included as a part of decedent's net estate. We must, therefore, inquire on what theory were they so included as a part of the estate. Insurance policies are property. Their legal status has been well established by numerous authorities. In the case of Tyler, Administratrix vs. Treas-

urer & Receiver General (226 Mass. 306) the Supreme Court of Massachusetts, in considering the question of the right to impose a tax on money paid to the beneficiary under an insurance policy, considered exhaustively, and laid down with clearness, the scope and character of insurance policies and the rights of beneficiaries thereunder. In substance, the court held that a policy of insurance is a contract, and that the rules which are applicable to contracts govern their interpretation and enforcement; that the rights of the beneficiary attach at once, when designated as such in the policy, and are protected both by common law and statute; that where the beneficiary is the wife, her rights instantly vest upon a meri-
133 torious consideration; that it is the general rule that a policy and the money to become due under it, the moment it is issued accrue to the person mentioned as beneficiary; that when the designation is made, his right is vested, taking complete effect as to that time, being in no wise modified or increased at the time of the death of the insured that such contracts are usually for the benefit of some dependent, and the insured retains no ownership of that which has passed to his beneficiary under the contract, and that so long as they last the nature of the beneficiary's rights is not affected by a right reserved to change the beneficiary. If his designation be considered a gift, it is a present one, taking immediate effect, both in possession and enjoyment by the beneficiary. To the amount due on the policy, the insured has no title, the right to such amount does not spring into existence until after his death, and even then the money belongs to the insurer, who is charged with the duty under the contract to pay to the beneficiary.

The courts of Pennsylvania have taken the same legal view of insurance policies, both under the common law and the statutes of the State. (Anderson's Estate, 85 Pa. 202; Elliot's Appeal, 50 Pa. 75.) If there were any question of the legal status of policies under the common law of Pennsylvania, there can be no doubt under the Pennsylvania statutes. By the act of 1868 (P. L. 103) "all policies of life insurance or annuities upon the life of any person which may hereafter mature, and which have been, or shall be taken out for the benefit of, or bona fide assigned to the wife or children, or any relative dependent on such person, shall be vested in such wife or children or other relative, full and clear from all claims of the creditors of such person." By the act
134 of 1873 (P. L. 41) assignees of insurance policies are authorized to bring suit in their own names. By the act of May 5, 1915 (P. L. 253), the rights of the wife and children under the act of 1868 were made more certain by the use of the words "notwithstanding the right to change the beneficiary named, has been reserved by the insured, or is permitted by the insurer."

Even before these latter acts were passed, the supreme court of the State, in Entwistle vs. Travelers' Insurance Co. (202 Pa. 141), held that the interests of a wife and children on a policy taken out by the husband on his life and payable to them as beneficiaries, were

vested interests which the insured had no power to disturb. In that case the policy was payable to the wife if she survived her husband, or in the event of her prior death, to the children; but if the insured survived the wife and children, then to his legal representatives. In the policy was a clause that it might be converted into cash at the option of the holder at the expiration of fifteen years. The husband and wife assigned the policy, and at the end of fifteen years, the assignee attempted to exercise the option and take the money. The Supreme Court held that neither husband nor wife, nor both together, had power to destroy the vested interest of the children, and no right to exercise the option existed in the assignee.

In Parsons' Estate (102 N. Y. Supp. 168), the policy was assigned to the wife, the insured having the right to change the beneficiary. It was held that the policy could not be taxed as a part of the insured's estate; that the wife obtained an immediate title right to enjoy the moneys when they became payable, and that this was so, although her title might be defeated by a change of beneficiary, or her own death during the lifetime of the insured.

135 To the same effect is Lloyd vs. Royal Union Mutual Life Ins. Co. (245 Fed. Rep. 162). In Washington Central Bank vs. Hume (128 U. S. 195), Chief Justice Fuller, speaking for the court, said: "It is, indeed, the general rule that a policy, and the money to become due under it, belong, the moment it is issued, to the person or persons named in it as the beneficiary or beneficiaries; and that there is no power in the person procuring the insurance by any act of his, by deed or by will, to transfer to any other person the interest of the person named" (citing a large number of cases in different States). As the policy in that case was issued in Connecticut, the court held that the rights and benefits given by the laws of that State were as much a part of the contract as if incorporated therein, not only because the contract was made there but was to be performed there and the parties stipulated with reference to the laws of that State.

It is not debatable therefore, that those policies in this case, which named Mrs. Frick as beneficiary, with no power reserved to change the beneficiary, vested in her absolutely. It is scarcely less clear that those policies made payable to the personal representatives of the insured, but which were afterwards assigned by him, in his lifetime, without reservation in the assignment or policies, to revoke the assignment, vested absolutely in his wife and daughter. Nor do I doubt that in those policies which contained no provision on the subject, but in which Mr. Frick by agreement with the company, substituted his daughter as beneficiary, reserving no right to further change the beneficiary, the daughter's rights became vested at

136 once. And finally, I am of opinion that in the three policies in which the assured reserved a right to revoke the assignments to his wife and daughter, but never did so, the rights of the assignees were vested and absolute; that those rights vested immediately under the assignment subject to a limitation; not a condi-

tional estate, vesting at the time of death, but an estate which vested at once, subject to be divested by the happening of an uncertain future event. As that event did not occur, there was no divestiture.

Under these facts, the policies being the property of others than the decedent, upon what legal basis does the imposition of these taxes rest? It is defendant's contention that the property itself is not taxed; that the tax is an excise on the right to transmit property at death; that the inclusion of nontaxable property in the measure of the tax, does not make the act unconstitutional, if the measure of the excise be reasonable; and that it is reasonable to measure such tax by including the value of any property of which the decedent has made testamentary disposition; that the purchase of a police of insurance on one's life is a testamentary disposition and therefore the act is valid. The answer to this position is, that the act undertakes to impose the tax upon the transfer of the net estate of the decedent, an excise on its passing as the result of death, as distinguished from a tax on the property itself. Here, there is no transfer at death, no passing of the property, upon whose value the percentages of taxation are based. Neither can it be said, as contended by defendant in its supplemental brief, that if the taxes imposed by sections 401 and 402 (f) cease to be an estate tax by reason of the effect of sections 408 and 409, it is transferred, not into a direct tax but into an
137 excise on the right of the beneficiaries to receive the insurance. This because estate taxes and what are known as legacy or inheritance taxes are of the same character, death being the source from which the taxing power arises. Estate excise taxes are based on the power to transmit or the transmission from the dead to the living; while legacy or inheritance taxes are based on the transmission or the right to receive the property in question. Here, the right of the beneficiaries to receive the insurance did not spring from the death of the testator. Their rights arose under contracts of insurance. The date of death is simply the time when the insurers became obligated to pay, and the beneficiaries entitled to receive, the proceeds of the policies under their contract. What Congress did under section 402 (f) was to impose a tax upon property, not an excise tax upon the happening of an event. In Pollock v. Farmers' Loan & Trust Co. (158 U. S. 601) the tax upon income derived from real estate and from personal property was held to be in effect a tax upon real and personal property. Here, the statute arbitrarily makes something a part of the Frick estate which in fact was no part of it, and upon the value of that undertakes to levy an estate tax, an ad valorem transfer excise tax, amounting to 25 per cent of the value. This, in my judgment, is the taking of property without due process of law; the levying of a direct tax without apportionment as required by the Constitution.

It is difficult to understand on what hypothesis this tax can be held valid. It would appear to be an attempt to impose a tax on the

amounts received by the beneficiaries under the policies, and to compel the executors to become the collectors of the tax, although
138 such amounts constituted no part of the estate and were not received by, nor in any manner under the control of, the executors. Gross inequities and unjust discriminations would inevitably result from such a method of imposing taxes. Should the tax exceed the value of the property, the possessor would be given no right to surrender it to the taxing power in lieu of payment. The estate would not be protected by the provision for recoupment; such right of action could never be the equivalent of immunity from taxes, even if an action would lie, by the executors, for the full amount paid, because of the uncertainties of enforcing judgment. Conspicuously is this true in the act under consideration, because it imposes a liability on the executors for the full amount of the taxes, and at the same time only enables them by action to recover a part. Not only so, but the amount of the tax depends, not upon the value of the policies, or the total amount of all the policies, but upon the amount of the dead man's estate, plus the value of the policies.

In Knowlton v. Moore, supra, which involved the interpretation of the war revenue act of 1898, where taxes had been collected on certain legacies and distributive shares, the rate being fixed, not on the amount coming to each individual, but on the whole personal estate, Chief Justice White condemned such method in these words:

139 "But this is equivalent to saying that the principle underlying the asserted interpretation is that the house of A, which is only worth one thousand dollars, may be taxed, but that the rate of the tax is to be determined by attributing to A's house the value of B's house, which may be worth a hundredfold the amount. The gross inequalities which must inevitably result from the admission of this theory are readily illustrated."

In the same spirit and with the same thought in mind, in Hartman v. Greenhow (102 U. S. 672), which involved the validity of a statute requiring a tax on bonds to be deducted from coupons, which were detached and held by different owners, Mr. Justice Field said:

"Surely it is not necessary to argue that an act which requires the holder of one contract to pay the taxes levied upon another contract held by a stranger can not be sustained. Such an act is not a legitimate exercise of the taxing power; it undertakes to impose upon one the burden which should fall, if at all, upon another."

In obedience to the authorities and the principles of law as I understand them, I am constrained to hold that the imposition and collection from the plaintiffs of $108,657.38, the amount of the tax in question, was without authority of law and in violation of the plaintiffs' constitutional rights, and that judgment for that amount should be entered for the plaintiffs with interest and costs, and it is accordingly so ordered.

140 In United States District Court

[Title omitted.]

Judgment

June 6, 1924, pursuant to the foregoing action of the court, judgment is hereby entered in favor of the plaintiffs, Adelaide H. C. Frick, Helen C. Frick, Childs Frick, H. C. McEldowney, and William Watson Smith, executors of the last will of Henry C. Frick, deceased, and against the defendant, C. G. Lewellyn, formerly collector of United States internal revenue for the twenty-third district of State of Pennsylvania, in the sum of one hundred eight thousand, six hundred fifty-seven & $\frac{38}{100}$ ($108,657.38) dollars, with interest thereon from May 31, 1921, viz, $19,666.99, and in the aggregate amount of one hundred twenty-eight thousand, three hundred, twenty-four & $\frac{37}{100}$ $128,324.37) dollars, and costs of suit.

J. Wood Clark, *Clerk.*

141 In United States District Court

[Title omitted.]

Defendant's exceptions and order overruling same

(Filed Aug. 27, 1924)

And now, to wit, on the 1st day of August, 1924, comes the defendant, by his attorneys, Walter Lyon, United States attorney, and Warren H. Van Kirk, special assistant United States attorney, and excepts to the action of the court in the above-entitled case as follows:

1. The learned court erred in the following portion of its opinion:

"It is perfectly clear that the taxes in question under section 401 are imposed upon the value of the net estate of the decedent, and their amount equals the sum of certain percentages of the value of such net estate varying from one per cent when the amount of the net estate is not in excess of $50,000, to twenty-five per cent of the amount by which the net estate exceeds $10,000,000."

2. The learned court erred in the following portion of its opinion:

"If it be true that the policies in question, on the death of decedent, did not pass from decedent's estate by will, descent, or distribution, and that no transfer of them was made in contemplation of death, within the meaning of the act, they would not be subject to a tax imposed, either directly or indirectly, upon the transfer of the net estate of the decedent. * * *"

141½ 3. The learned court erred in the following portion of its opinion:

"The amount of the net estate here made taxable under the act was increased by the total amount of the policies involved, with the result that the amount of the tax in dispute was imposed upon, and

arose solely from, the value of these policies included as a part of decedent's net estate. * * *"

4. The learned court erred in the following portion of its opinion:

"The answer to this position is that the act undertakes to impose the tax upon the transfer of the net estate of the decedent, an excise on its passing as the result of death, as distinguished from a tax on the property itself. Here there is no transfer at death, no passing of the property upon whose value the percentages of taxation are based. * * *"

5. The learned court erred in the following portion of its opinion:

"Here the right of the beneficiaries to receive the insurance did not spring from the death of the testator. * * *"

6. The learned court erred in the following portion of its opinion:

"Should the tax exceed the value of the property, the possessor would be given no right to surrender it to the taxing power in lieu of payment. The estate would not be protected by the provision for recoupment; such right of action could never be the equivalent of immunity from taxes, even if an action would lie, by the executors, for the full amount paid, because of the uncertainties of enforcing judgment. Conspicuously is this true in the act under consideration, because it imposes a liability on the executors for the full amount of the taxes, and at the same time only enables them by action to recover a part. Not only so, but the amount of the tax depends not upon the value of the policies or the total amount of all the policies but upon the amount of the dead man's estate plus the value of the policies."

7. The learned court erred in the following conclusion of law:

"In obedience to the authorities and the principles of law as I understand them, I am constrained to hold that the imposition and collection from the plaintiffs of $108,657.38, the amount of the tax in question, was without authority of law and in violation of the plaintiffs' constitutional rights and that judgment for that amount should be entered for the plaintiffs, and it is accordingly so ordered."

142 8. The learned court erred in entering the following judgment:

"In obedience to the authorities and the principles of law as I understand them, I am constrained to hold that the imposition and collection from the plaintiffs of $108,657.38, the amount of the tax in question, was without authority of law and in violation of the plaintiffs' constitutional rights, and that judgment for that amount should be entered for the plaintiff, with interest and costs, and it is accordingly so ordered. Pursuant to the foregoing action of the court, judgment is hereby entered in favor of the plaintiffs, Adelaide H. C. Frick, Helen C. Frick, Childs Frick, H. C. McEldowney, and William Watson Smith, executors of the last will of Henry C. Frick, deceased, and against the defendant, C. G. Lewellyn, formerly collector of United States internal revenue for the twenty-third district of Pennsylvania in the sum of one hundred and eight thousand six hundred and fifty-seven and $\frac{38}{100}$ dollars ($108,657.38) with

interest thereon from May 31, 1921, viz, $19,666.99, and in the aggregate amount of one hundred twenty-eight thousand three hundred twenty-four and $\frac{37}{100}$ (128,324.37) dollars, and costs of suit."

9. The learned court erred in refusing to enter judgment for the defendant against the plaintiffs.

WALTER LYON,
United States Attorney.
WARREN H. VANKIRK,
Special Assistant United States Attorney.

And now, to wit, on the 1st day of August, 1924, upon consideration of the foregoing exceptions it is ordered that the same be and they are hereby overruled, to which action of the court the defendant excepts, and at the instance of counsel for the defendant a bill of exceptions is allowed and sealed.

W. H. S. THOMSON, [SEAL.]
Judge, United States District Court,
for the Western District of Pennsylvania.

143 In United States District Court

[Title omitted.]

Bill of exceptions and order settling same

Filed August 27, 1924

Be it remembered that at the above number and term came into this court Adelaide H. C. Frick, Helen C. Frick, Childs Frick, H. C. McEldowney, and William Watson Smith, executors of the last will of Henry C. Frick, deceased, and C. G. Lewellyn, formerly collector of the United States internal revenue for the twenty-third district of the State of Pennsylvania, and the plaintiffs moved for leave to amend their statement of claim, whereupon the leave so to amend was granted and the plaintiffs' statement of claim amended (see Motion and leave for further amendment) and the said parties then filed a stipulation of facts (see Stipulation) and thereupon issue was duly joined and afterwards, to wit, at a session of this court held on the 26th day of November, A. D. 1923, the said issue came on to be tried before the Hon. W. H. S. Thompson, dis-
144 trict judge, without a jury (see Waiver of jury trial), at which time appeared the plaintiffs and defendant by their respective attorneys, and on the 5th day of June, A. D. 1924, the court filed its opinion (see Opinion of court), and on the 5th day of June, 1924, the court ordered and directed the clerk of this court to enter judgment for the plaintiffs in the sum of dollars and refused to enter judgment in favor of the defendant against the plaintiffs (see Order), and counsel for defendant thereupon duly excepted to said order of the court and his conclusions of law upon which said order

was based (see Exceptions) which exceptions were duly noted and the bill sealed.

Whereupon on the 27th day of August, A. D. 1924, the said defendant filed his petition for a writ of error and presented his said petition with his assignment of errors, and on the same day said writ was duly allowed and issued and a citation was thereupon issued and served upon counsel for the defendant, and thereupon the aforesaid judge did to this bill of exceptions in pursuance of the request of the defendant and the law put his seal this 27th day of August, A. D. 1924.

W. H. S. THOMSON, [SEAL.]
Judge of the United States District Court
for the Western District of Pennsylvania.

145 In United States District Court

[Title omitted.]

Petition for and order allowing writ of error

(Filed August 27, 1924)

And now comes C. G. Lewellyn, formerly collector of United States internal revenue for the twenty-third district of Pennsylvania, defendant herein, and says:

That on or about the 5th day of June, 1924, the United States District Court for the Western District of Pennsylvania entered a judgment herein in favor of the plaintiffs against the defendant, in which judgment and the proceeding had prior thereto in this cause certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors, which is filed with this petition.

That this petition for writ of error is filed by the direction of the Bureau of Internal Revenue of the Treasury Department of the United States.

Wherefore this defendant prays that the writ of error in this behalf to the Supreme Court of the United States for the cor-
146 rection of the errors so complained of be allowed, and that a transcript of the records, proceedings and papers in this cause, duly authenticated, be sent to the Supreme Court of the United States.

WALTER LYON,
United States Attorney.
WARREN H. VAN KIRK,
Special Assistant United States Attorney.

ORDER

And now, this 27th day of August, 1924, it is ordered that the writ of error be allowed as prayed for.

W. H. S. THOMSON,
United States District Judge.

147 In United States District Court

[Title omitted.]

Assignment of errors

(Filed Aug. 27, 1924)

And now, to wit, August 27th, 1924, comes the defendant, by C. G. Lewellyn, formerly collector of United States internal revenue for the twenty-third district of the State of Pennsylvania, by Walter Lyon, United States attorney, and Warren H. Van Kirk, special assistant United States attorney, his attorneys, and having presented his petition for a writ of error in the above-entitled case, files therewith the following assignment of errors, upon which he relies to sustain the writ of error prayed for:

1. The United States District Court for the Western District of Pennsylvania erred in entering the following judgment:

"In obedience to the authorities and the principles of law as I understand them, I am constrained to hold that the imposition and collection from the plaintiffs of $108,657.38, the amount of the tax in question, was without authority of law and in violation of the plaintiff's constitutional rights, and that judgment for that amount should be entered for the plaintiffs, with interest and costs, and it is accordingly so ordered."

"Pursuant to the foregoing action of the court, judgment is hereby entered in favor of the plaintiffs, Adelaide H. C. Frick, Helen C. Frick, Childs Frick, H. C. McEldowney, and William Watson Smith, executors of the last will of Henry C. Frick, deceased, and against the defendant, C. G. Lewellyn, formerly collector of United States internal revenue for the twenty-third district of Pennsylvania, in the sum of one hundred eight thousand, six hundred and fifty-seven and $\frac{38}{100}$ dollars ($108,657.38), with interest thereon from May 31, 1921, viz, $19,666.99, and in the aggregate amount of one hundred twenty-eight thousand, three hundred twenty-four and $\frac{37}{100}$ ($128,-324.37) dollars, and costs of suit."

148 2. The United States District Court for the Western District of Pennsylvania erred in refusing to enter judgment for the defendant against the plaintiff.

3. That the United States District Court for the Western District of Pennsylvania erred in holding and adjudging that the tax imposed by Title IV of the revenue act of 1918 is a direct tax upon the proceeds of life insurance policies and unconstitutional.

4. That the United States District Court for the Western District of Pennsylvania erred in holding and adjudging that the tax imposed by Title IV of the revenue act of 1918 is a direct tax upon the beneficiaries under policies of life insurance taken out by the decedent upon his own life and is unconstitutional.

5. That the United States District Court for the Western District of Pennsylvania erred in holding and adjudging that section 402 (f) of Title IV of the revenue act of 1918 is unconstitutional.

6. That the United States District Court for the Western District of Pennsylvania erred in holding and adjudging that section 408 of Title IV of the revenue act of 1918 is unconstitutional.

7. That the United States District Court for the Western District of Pennsylvania erred in holding and adjudging that the inclusion of the amount in excess of $40,000.00 receivable by all beneficiaries other than the estate of the decedent as insurance under policies taken out by the decedent upon his own life in the decedent's gross estate, is unconstitutional and invalid.

8. That the United States District Court for the Western District of Pennsylvania erred in holding and adjudging that the sum of $434,629.52 was improperly included in the decedent's gross estate.

149 9. That the United States District Court for the Western District of Pennsylvania erred in holding and adjudging that the rights of the beneficiaries to receive the proceeds of the policies mentioned in the pleadings did not spring from the death of the testator.

10. That the United States District Court for the Western District of Pennsylvania erred in holding and adjudging that Congress under section 402 (f) of the revenue act of 1918 imposed a tax upon property and not an excise tax upon the happening of an event.

11. That the United States District Court for the Western District of Pennsylvania erred in holding and adjudging that the plaintiffs were entitled to recover the sum of $108,657.38, with interest and costs.

12. That the United States District Court for the Western District of Pennsylvania erred in holding and adjudging that the imposition and collection from the plaintiffs of $108,657.38, the amount of the tax in question, was without authority or law, and in violation of the plaintiffs' constitutional rights.

Wherefore the defendant prays that the said judgment be reversed and that the said District Court for the Western District of Pennsylvania be ordered to enter a judgment reversing the decision of the lower court in said cause.

WALTER LYON,
United States Attorney.
WARREN H. VAN KIRK,
Special Assistant United States Attorney.

150 In United States District Court

[Title omitted.]

Præcipe for Record

(Filed Sept. 3, 1924.)

SIR: In making up the transcript of the record in the above-entitled cause include the following papers and no others:

1. Docket entries.
2. Plaintiffs' statement of claim.
3. Motion and leave to amend statement of claim.
4. Affidavit of defense.
5. Stipulation of fact.
6. Transcript of testimony, which includes motion and leave to amend further and plaintiffs' offers not denied.
7. Stipulation to try without a jury.
8. Opinion.
9. Judgment.
10. Exceptions.
11. Bill of exceptions.

151 12. Petition for writ of error and order allowing same.

13. Assignments of error.
14. Præcipe and stipulation for record.
15. Clerk's certificate.

WALTER LYON,
United States Attorney.
WARREN H. VAN KIRK,
Special Assistant United States Attorney.

To the Clerk, Pittsburgh, Pa.

It is hereby agreed that the above-specified papers and proceedings shall constitute the record in this case before the United States Supreme Court.

September 3, 1924.

S. G. NOLIN,
Of counsel for Plaintiffs.

[File indorsement omitted.]

152 In United States District Court

[Title omitted.]

Clerk's certificate

I, J. Wood Clark, clerk of the District Court of the United States for the Western District of Pennsylvania, do hereby certify that the annexed and foregoing pages contain a true and correct copy of the record sur writ of error in the above-entitled case, so full and entire

as the same remains of record and on file in my office, in the city of Pittsburgh, in said district.

In testimony whereof I have hereunto signed my name and affixed the seal of the said court at Pittsburgh, this 12th day of September, A. D. 1924.

[SEAL.] J. WOOD CLARK, *Clerk.*

In United States District Court

Judge's certificate to clerk

I, Robert M. Gibson, district judge of the United States for said district, do hereby certify that J. Wood Clark, above named, was, at the time of making the above certificate, and is now, clerk of the said court, and that the said certificate made by him is in due form of law.

Pittsburgh, September 12th, 1924.

ROBERT M. GIBSON,
United States District Judge.

In United States District Court

Clerk's certificate to judge

I, J. Wood Clark, clerk of the District Court of the United States for the Western District of Pennsylvania, do certify that the honorable Robert M. Gibson, by whom the foregoing attestation was made, and who has thereunto subscribed his name, was, at the time of making thereof, and still is, judge of the district court of the United States in and for said district, duly commissioned and qualified, to all whose acts, as such, full faith and credit are and ought to be given as well in the courts of judicature as elsewhere.

In testimony wherefore I have hereunto signed my name and affixed the seal of said court, at Pittsburgh, in said district, this 12th day of September, A. D. 1924.

[SEAL.] J. WOOD CLARK, *Clerk.*

153 In United States District Court

[Title omitted.]

Petition to Amend writ of error and citation

(Filed Sept. 29, 1924)

To the Honorable the Judges of said Court:

The petition of Warran H. Van Kirk, special assistant United States attorney, respectfully represents:

That in the above-entitled case the writ of error and citation were duly executed and issued on the 4th day of September, 1924,

by J. Wood Clark, Clerk of the United States District Court for the Western District of Pennsylvania.

That on said writ of error, it was inadvertently stated that the United States of America was the party defendant, whereas the party defendant should have been C. G. Lewellyn, formerly collector of the United States internal revenue for the twenty-third district of Pennsylvania.

154 That in said citation it was inadvertently stated that the United States of America is plaintiff in error, whereas the plaintiff in error should have been C. G. Lewellyn, formerly collector of the United States internal revenue for the twenty-third district of Pennsylvania.

Wherefore your petitioner prays your honorable court to order said writ of error to be amended so as to read that C. G. Lewellyn, formerly collector of the United States internal revenue for the twenty-third district of Pennsylvania, is the party defendant instead of the United States of America, and to order said citation to be amended so as to read that C. G. Lewellyn, formerly collector of the United States internal revenue for the twenty-third district of Pennsylvania, is plaintiff in error instead of the United States of America.

And he will ever pray.

WARREN H. VAN KIRK,
Special Assistant United States Attorney.

[Jurat showing the foregoing was duly sworn to by W. H. Van Kirk. Omitted in printing.]

155 ORDER

And now, to wit, September 29, 1924, the within petition presented in open court, and upon due consideration thereof, it is ordered, adjudged, and decreed that the writ of error heretofore issued in the within case be amended so as to read that C. G. Lewellyn, formerly collector of United States internal revenue for the twenty-third district of Pennsylvania, is defendant therein, instead of the United States of America.

And it is further ordered, adjudged, and decreed that the citation heretofore issued in the within case be amended so as to read that C. G. Lewellyn, formerly collector of the United States internal revenue for the twenty-third district of Pennsylvania, is plaintiff in error, instead of the United States of America.

[SEAL.] PER CURIAM.
S.

September 29, 1924, the foregoing petition, consent, and order of court, certified from the record as a true copy.

J. WOOD CLARK, *Clerk.*

[File indorsement omitted.]

156 In United States District Court

Writ of error

UNITED STATES OF AMERICA, *ss.*

The President of the United States to the Honorable the Judges of the District Court of the United States for the Western District of Pennsylvania, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, between Adelaide H. C. Frick, Helen C. Frick, Childs Frick, H. C. M. Eldowney, and William Watson Smith, executors of the last will of Henry C. Frick, deceased, plaintiffs, and United States of America, defendant, a manifest error hath happened, to the great damage of the said defendant, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the same at the city of Washington, D. C., on the 3rd day of October next, in the said United States Supreme Court to be then and there held, that the record and proceedings aforesaid, being inspected, the said United States Supreme Court may cause further to be done to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the honorable Wm. Howard Taft, Chief Justice of the Supreme Court of the United States, this 4th day of Sept., A. D. 1924.

[SEAL.] J. WOOD CLARK, *Clerk.*

Allowed by W. H. S. Thomson, judge; citation by F. P. Schoonmaker, judge.

157 [Citation in usual form, showing service on S. G. Nolin, omitted in printing.]

158 In United States District Court

Writ of error

UNITED STATES OF AMERICA, *ss.*

The President of the United States to the Honorable the Judges of the District Court of the United States for the Western District of Pennsylvania, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before

you, between Adelaide H. C. Frick, Helen C. Frick, Childs Frick, H. C. McEldowney, and William Watson Smith, executors of the last will of Henry C. Frick, deceased, plaintiffs, and C. G. Lewellyn, formerly collector of United States internal revenue for the twenty-third district of Pennsylvania, defendant, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the same at the city of Washington, D. C., on the third day of October next, in the said United States Supreme Court, to be then and there held that the record and proceedings aforesaid, being inspected, the said United States Supreme Court may cause further to be done to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the honorable Wm. Howard Taft, Chief Justice of the Supreme Court of the United States, this 4th day of Sept., A. D. 1924.

[SEAL.] J. WOOD CLARK, *Clerk.*

Allowed by W. H. S. Thomson, judge; citation by F. P. Schoonmaker, judge.

159 [Citation as amended by order of court September 29, 1924, showing service on S. G. Nolin, omitted in printing.]

[Indorsed on file wrapper:] File No. 30,646. W. Pennsylvania, D. C. U. S. Term No. 681. C. G. Lewellyn, formerly collector of United States internal revenue for the twenty-third district of Pennsylvania, plaintiff in error, vs. Adelaide H. C. Frick, Helen C. Frick, Childs Frick, et al., etc. Filed October 2nd, 1924. File No. 30,646.

160 *Stipulation to omit parts of the record in printing*

(Filed Feb. 9, 1925)

It is hereby stipulated by and between the parties to the above-entitled action that in printing the transcript of the record the clerk may omit the following parts of plaintiff's Exhibit 1, stipulation as to facts, in the court below:

Photostat copies of the below-enumerated life insurance policies, together with photostat copies of applications for insurance, assignments, proofs of death, checks in payment of policies, where same are accompanying. These items make up pages 37 to 110, inclusive, of the certified record.

Policy No. 164814, Equitable Life Assurance Society of the United States, for $114,000.00.

Policy No. 103932, New York Life Insurance Company, for $10,000.00.

Policy No. 163109, Mutual Life Insurance Company of New York, for $10,000.00.

Policy No. 501052, New York Life Insurance Company, for $25,000.00.

Policy No. 497958, New York Life Insurance Company, for $65,000.00.

61 Policy No. 54105, Nederland Life Insurance Company, Ltd., for $20,000.00.

Policy No. 294284, Equitable Life Assurance Society of the United States, for $50,000.00.

Policy No. 158055, Mutual Benefit Life Insurance Company, for $10,000.00.

Policy No. 23135, State Mutual Life Assurance Company of Worcester, Massachusetts, for $20,000.00.

Policy No. 31580, Berkshire Life Insurance Company, for $20,000.00.

Policy No. 190366, The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, for $50,000.00.

Said omitted matter, however, shall be considered a part of the ecord before the court and either party may refer to such portions hereof as counsel may consider material.

Dated January 21, 1925.

JAMES M. BECK,
Solicitor General.
GEORGE B. GORDON,
JOHN G. BUCHANAN,
Attorneys for Defendant in Error.

[File indorsement omitted.]

○

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AUTHORITIES CITED

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CASES

MISCELLANEOUS CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1924

C. G. LEWELLYN, FORMERLY COLLECTOR OF United States Internal Revenue for the Twenty-third District of the State of Pennsylvania, plaintiff in error
v.
ADELAIDE H. C. FRICK, HELEN C. FRICK, Childs Frick, H. D. McEldowney, and William Watson Smith, Executors of the Last Will of Henry C. Frick, deceased, defendants in error

No. 681

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR PLAINTIFF IN ERROR

STATEMENT OF THE CASE

This is an action brought by the Executors of the Last Will of Henry C. Frick, deceased, against C. G. Lewellyn, former Collector of Internal Revenue for the Twenty-third District of Pennsylvania, to recover an Estate Tax alleged to have been erroneously assessed and collected in the sum of $108,657.38 under the provisions of Section 402 (f) of the Revenue Act of 1918. (Act of Feb. 24, 1919, C. 18, 40 Stat. 1057, 1098.) The case was tried

by the Court without a jury upon an agreed statement of facts. Judgment was entered in the Court below for the defendants in error upon the ground that the Statute under which the tax was collected was in conflict with the Constitution.

THE FACTS

Henry C. Frick, a resident of the State of Pennsylvania, died December 2, 1919, testate. Letters testamentary were duly issued to defendants in error, who duly qualified as Executors and continued to act as such.

At the time of testator's death there were outstanding eleven policies of insurance upon his life, four of which were payable to his wife and seven to his daughter. The aggregate amount of these policies was $474,629.52. This amount, less $40,000, was included in the gross estate of the decedent, and the additional tax assessed to the estate on account of this insurance was $108,657.38, the amount sought to be recovered here. The policies in question were taken out by the decedent at various times, the first in 1874, and the last in 1901.

The policies were of different classes. Some were made payable to Mr. Frick's estate, with no provision for change of beneficiaries, but were subsequently assigned to his wife and daughter, without reservation of power to revoke the assignment. Some were made payable to Mr. Frick's executors, and subsequently by arrangement with the company were made payable to his daughter as

beneficiary, without power reserved further to change the beneficiary. In others, the wife and the daughter were named as beneficiaries, the policies containing no power which enabled the insured to change the beneficiary. The material details of the several policies are set out in Appendix A.

Mr. Frick did not in his lifetime revoke the assignments of any of his policies or designate any beneficiary other than those named, or surrender any of the policies or obtain any loans thereon from the insurance companies. He paid all premiums as they fell due.

The Executors paid the tax of $108,657.38 under protest, and on or about December 29, 1921, filed a claim for a refund. This claim was rejected by the Commissioner of Internal Revenue on or about January 23, 1923, whereupon the Executors commenced this suit.

THE ISSUE

Whether the tax was constitutionally assessed and collected is the sole issue in the case.

THE STATUTES

The material portions of the Revenue Act of 1918 (Act of February 24, 1919, c. 18, 40 Stat. 1057) are as follows:

> SEC. 401. That (in lieu of the tax imposed by Title II of the Revenue Act of 1916, as amended, and in lieu of the tax imposed by Title IX of the Revenue Act of 1917) a tax equal to the sum of the following percent-

ages of the value of the net estate (determined as provided in section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States:

1 per centum of the amount of the net estate not in excess of $50,000;

* * * [Here follow the graduated rates and amounts from $50,000 up to $10,000,000] * * *;

25 per centum of the amount by which the net estate exceeds $10,000,000. * * *. (40 Stat. 1096, 1097.)

SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated. (40 Stat. 1097.)

* * * * *

(f) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life. (40 Stat. 1098.)

SEC. 403. That for the purpose of the tax the value of the net estate shall be determined—(by deducting from the gross estate determined as provided in Sec. 402 certain amount for debts, expenses, losses, chari-

table gifts, etc., and a specific exemption of $50,000). (40 Stat. 1098.)

* * * * *

SEC. 407. That the executor shall pay the tax to the collector or deputy collector. (40 Stat. 1100.) * * *

ARGUMENT

I

Section 402 (f) of the Revenue Act of 1918 provides a reasonable measure of an excise tax imposed upon a transmission of a decedent's property by death.

(1) *The tax is not a direct tax but an excise measured by the value of the net estate.*

It is quite well settled that a tax such as that imposed by Title IV of the Revenue Act of 1918 (40 Stat. 1096) is not a direct tax on property, but is an excise. *New York Trust Company* v. *Eisner,* 256 U. S. 345; *Greiner* v. *Lewellyn,* 258 U. S. 384; *Edwards* v. *Slocum,* 264 U. S. 61; *Y. M. C. A.* v. *Davis,* 264 U. S. 47; *United States* v. *Woodward,* 256 U. S. 632.

The tax is an excise tax imposed upon the transfer of an estate upon the death of the owner, and is generated or occasioned by death. It relates to the cessation of the decedent's interest in property rather than to the receipt of portions of that property by the various beneficiaries. By the words of the Statute it is imposed upon the transfer of the "net estate," not upon the property or upon the transfer of title to the property embraced in the

gross estate. Not only the words of the Statute but its structure indicate that the tax is not upon the transfer of title of the property included in the gross estate.

Much of that property, though undoubtedly transferred by death, is excluded from the net estate by the deductions allowed (e. g., the $50,000 exempt and the amounts equal to debts, etc.). On the other hand, some of the property included in the gross estate was not transferred from the decedent (e. g., property passing under a general power of appointment), and some was not his property at the time of his death (e. g., the property transferred in contemplation of death), and some of it was not at any time his property (e. g., dower).

In its latest expressions this Court has so defined the tax. Thus, in *Greiner* v. *Lewellyn,* 258 U. S. 384, Mr. Justice Brandeis said that the case of *New York Trust Company* v. *Eisner,* 256 U. S. 345, decided that the Federal Government "has power to tax the transfer of the net assets of a decedent's estate." So, in the case of *Y. M. C. A.* v. *Davis,* 264 U. S. 47, Mr. Chief Justice Taft, at page 50, said:

> What was being imposed here was an excise upon the transfer of an estate upon death of the owner.

Mr. Justice Holmes said in *Edwards* v. *Slocum,* et al., 264 U. S. 61, 62:

> But this is not a tax upon a residue, it is a tax upon a transfer of his net estate by a decedent * * *.

The object of Congress in fixing the property to be included in the valuation of the gross estate was to afford a reasonable and just measure for an excise tax upon the transfer of such property as was transferred by death. Obviously such a measure would not have been afforded if only transfers by will or by the intestate laws of property which the decedent actually owned at the time of his death were included. Leaving out of consideration the fact that property owners would avail themselves of other lawful means of accomplishing the same purpose, neither making a will nor retaining any property to pass by intestacy, it would be unfair and unreasonable to tax a transfer by one method and leave untaxed a transfer by a different method, but which accomplished the same result. Hence Congress in Title IV of the Revenue Act of 1918 imposing an Estate Tax has done two things:

1. It has imposed an excise tax upon the transfer of the decedent's property, i. e., his net assets. *Greiner* v. *Lewellyn,* supra; *Y. M. C. A.* v. *Davis,* supra.

2. It has provided a measure for that tax based not solely upon the transfer of the decedent's property (although that property is included, see Section 402 (a), 40 Stat. 1097), but upon transactions whether transfers from the decedent or not, which accomplished the same results as testamentary dis-

positions would accomplish. *Pennsylvania Company* v. *Lederer*, 292 Fed. 629; *McElligott* v. *Kissam*, 275 Fed. 545; *Farmers' Loan & Trust Company* v. *Winthrop*, 238 N. Y. 488.

This distinction between the occasion of the tax and the measure of the tax is substantial. It is not a mere subterfuge adopted by Congress to tax by indirection transfers which it could not directly tax. In the first place, as will presently appear, Congress might have taxed a transfer such as the one involved here. Moreover, the history of this tax discloses that there was no attempt to evade constitutional restrictions. For although the sections of the succeeding Acts *imposing the tax* have not been changed, but have constantly imposed the tax in substantially the same language (c. f., Section 201 of the Revenue Act of 1916 (Act Sept. 8, 1916, c. 463, 39 Stat. 756, 777), Section 300 of the Revenue Act of March 3, 1917 (c. 159, 40 Stat. 1000, 1002), Section 900 of the Revenue Act of 1917 (Act of Oct. 3, 1917, c. 63, 40 Stat. 300, 324), Section 401 of the Revenue Act of 1918 (40 Stat. 1097), Section 401 of the Revenue Act of 1921 (Act of Nov. 23, 1921, c. 136, 42 Stat. 227, 277), and Section 301 of the Revenue Act of 1924 (Act of June 2, 1924, c. 234, 43 Stat. 253, 303)), the *measure of the tax* has been from time to time changed to meet the necessities of practical operation. Congress, even before it included the section herein complained of, taxed transfers generated by death. It still does so. It has not adopted as a subterfuge a

tax on the transfer of a net estate in order to tax a transfer of something else, because it taxed the transfer of the net estate before it included the objectionable transfers. Therefore, such cases as *Delaware, L. & C. R. R. Co.* v. *Pennsylvania,* 198 U. S. 341; *Louisiana, etc. Ferry Co.* v. *Kentucky,* 188 U. S. 385; *Galveston Harrisburgh, etc., Ry. Co.* v. *Texas,* 210 U. S. 217; *Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1; *Wallace* v. *Hines,* 253 U. S. 66, which held that the name given by a State Legislature to a tax can not control its essential character and legitimatize a tax which is " in substance and fact, though not in form, a tax specifically levied upon the property of the corporation " when that property is not subject to tax, are not in point here; for this tax is essentially, in substance as well as in form, an excise " generated by death and more immediately rested upon the transmission or power to transmit property from the dead to the living." *Knowlton* v. *Moore,* 178 U. S. 41.

As this Court said in *Flint* v. *Stone Tracy Company,* 220 U. S. 107, 163–164:

> There is nothing in these cases contrary, as we shall have occasion to see, to the former rulings of this Court, which hold that where a tax is lawfully imposed upon the exercise of privileges within the taxing power of the State or nation the measure of such tax may be the income from the property of the corporation, although a part of such income is derived from property in itself nontaxable. The distinction lies between the attempt to

> tax property as such and to measure a legitimate tax upon the privileges involved in the use of such property.

But it has been insisted that the present tax is not essentially an excise since it is not a tax upon a transmission of property from the dead to the living, and that it can not be such a tax because death had nothing to do with the transmission, since the title had irrevocably vested long before death, and moreover it was not the decedent's property at the time of death. We shall subsequently have occasion to show that an excise may be retroactive, so that, had Congress imposed this tax upon the transfers made prior to the passage of the Act, it would still be an excise and valid. At present, however, we are concerned with the measure of a tax not a tax imposed upon the transfer of these policies but upon a transfer which actually did take place at death, namely, of the property of which the decedent died seized and possessed. We respectfully submit that if this tax is generated by death, and is immediately rested upon the power to transmit, or the transmission of property from the dead to the living, then it is an excise and does not lose its character as such by reason of the fact, if it be a fact, that a tax upon the occasion or property which affords the measure would be a direct tax.

This Court in the case of *Flint* v. *Stone Tracy Company*, 220 U. S. 107, 162, said:

> It is further contended that some of the corporations, notably insurance companies,

> have large investments in municipal bonds and other nontaxable securities, and in real estate and personal property not used in the business, that therefore the selection of the measure of the income from all sources is void, because it reaches property which is not the subject of taxation—upon the authority of the *Pollock Case, supra.* But this argument confuses the measure of the tax upon the privilege, with direct taxation of the estate or thing taxed.

After a discussion of decided cases the Court continued (p. 165):

> It is therefore well settled by the decisions of this court that when the sovereign authority has exercised the right to tax a legitimate subject of taxation as an exercise of a franchise or privilege, it is no objection that the measure of taxation is found in the income produced in part from property which of itself considered is nontaxable. Applying that doctrine to this case, the measure of taxation being the income of the corporation from all sources, as that is but the measure of a privilege tax within the lawful authority of Congress to impose, it is no valid objection that this measure includes, in part at least, property which as such could not be directly taxed. * * *

Again this Court said in the case of *Maxwell* v. *Bugbee*, 250 U. S. 525, 539–540:

> * * * When the State levies taxes within its authority, property not in itself

> taxable by the State may be used as a measure of the tax imposed. This principle has been frequently declared by decisions of this Court. * * * It is only in instances where the State exceeds its authority in imposing a tax upon a subject matter within its jurisdiction in such a way as to really amount to taxing that which is beyond its authority, that such exercise of power by the State is held void. * * *

Again, in *Bullen* v. *Wisconsin*, 240 U. S, 625, 632, it was held that there was no "constitutional obstacle to the State of Wisconsin adopting * * * as the measure of the tax" property which was without her taxing jurisdiction.

This sort of tax is considered to be an excise, not so much because it comes within the definition of the lexicographer, but because it has always been so treated by reason of the particular occasion which gives rise to it. On this subject a page of history is worth a volume of logic. *New York Trust Company* v. *Eisner,* 256 U. S. 345. Moreover, it is not within that definition of direct taxes enunciated by this Court in *Pollock* v. *Farmers' Loan & Trust Company,* 157 U. S. 429. That is to say, it is not a tax imposed by reason of the ownership of property. Rather it is a tax imposed by reason of the cessation of ownership. The very objection made in the case at bar is that there is no ownership. Manifestly then, whatever else may be the occasion of this tax, it is not generated by ownership. It is, therefore, not a direct tax within the constitutional

meaning of that term. But it is said that, as there are only two classes of taxes, this must be direct, because a tax is not indirect when there is an "unavoidable demand." To sustain this view expressions of this Court, as in the case of *Thomas* v. *United States,* 192 U. S. 363, are cited. In that case the Court, after deciding that a certain stamp tax on the sale of shares of corporate stock was not a direct tax, said (p. 371):

> The sale of stocks is a particular business transaction in the exercise of the privilege afforded by the laws in respect to corporations of disposing of property in the form of certificates. The stamp duty is contingent on the happening of the event of sale, and the element of absolute and unavoidable demand is lacking. As such it falls, as stamp taxes ordinarily do, within the second class of the forms of taxation.

And so in the case of *Flint* v. *Stone Tracy Company,* 220 U. S. 107, after deciding that the corporation excise tax of 1909 was an indirect tax, the Court said (p. 151–152):

> * * * the requirement to pay such taxes involves the exercise of privileges, and the element of absolute and unavoidable demand is lacking. If business is not done in the manner described in the statute, no tax is payable.

These cases might be cited as authorities holding that a tax which is not an absolute and unavoidable

demand is not a direct tax. The converse is not necessarily true, so that these cases are not authorities supporting the proposition that indirect taxes must be avoidable. In other words, so far as this Court has yet said, where the demand is avoidable the tax is not direct, but where the demand is unavoidable or absolute the tax may be direct or indirect according to the occasion which gives rise to it, be it the ownership of the property or the happening of an event. *Pollock* v. *Farmers' Loan & Trust Company,* 157 U. S. 429. In the *Pollock case* it is determined that direct taxes are capitation taxes, and taxes "upon real estate *eo nomine* (or upon personality) or upon its owners in respect thereof," and that there is no "distinction between the real estate itself or its owners in respect of it and the rents or income of the real estate coming to the owners as the natural and ordinary incident of their ownership." (Page 580.) A death duty is not within this definition a direct tax, because there is no right to transfer property at death attached to the ownership of property as one of its "natural and ordinary incidents." *Plummer* v. *Coler,* 178 U. S. 115; *Keeney* v. *Comptroller,* 222 U. S. 525; *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 283.

The objection that the tax was unavoidable and therefore direct was presented and rejected in *New York Trust Company* v. *Eisner,* 256 U. S. 345. All death duties are in a practical sense unavoidable, for every one must die. Death, which is the gener-

ating source of the tax (*Knowlton* v. *Moore,* 178 U. S. 41), is unavoidable. It is true that the owner of property may destroy it and thus escape the tax, but such a chimerical possibility is hardly such an election as is contemplated by this Court in speaking of an "avoidable demand." However this may be, it is certain that the decedent in this case had exactly the same opportunity to avoid the *tax* as any other decedent. But he did not; he died, the owner of property which was transmitted by reason of his death. His estate, accordingly, became liable to the tax, just as would be the estate of any other person dying after the passage of the Act. The only thing which the decedent in this case could not avoid equally with others was the measure of the tax. That he could not avoid or change the measure does not seem to be material to the determination of the constitutionality of the imposition. *Bass, Ratcliff & Gretton* v. *State Tax Comn.,* 266 U. S. 271.

(2) *A measure which bears a reasonable relation to the subject matter of the tax is constitutional although the property affording the measure could not itself be taxed.*

It has been repeatedly held by this Court that an excise tax may be measured by property or transactions which would in themselves not be taxable. Thus in *Maxwell* v. *Bugbee,* 250 U. S. 525, it was held that the State of New Jersey could impose a tax upon the succession of the personal representative in New Jersey to a nonresident decedent's

local property, and could measure that tax by real estate and other property outside the State and beyond the taxing jurisdiction of the State.

In the case of *Flint* v. *Stone Tracy Company,* 220 U. S. 107, Congress imposed an excise tax upon corporations for the privilege of doing business in a corporate capacity. The tax thus imposed was measured by the income of the corporation from all sources, although income itself could not be taxed.

In the case of *Greiner* v. *Lewellyn,* 258 U. S. 384, this Court held that municipal bonds issued by political subdivisions of the State of Pennsylvania might properly be included by Congress in the gross estate of a decedent for the purpose of measuring the tax imposed by the Revenue Act of 1916 upon the transfer of the net estate of decedents.

In the case of *Plummer* v. *Coler,* 178 U. S. 115, it was held that a legacy tax imposed by the State of New York might properly be measured by the value of the legacy, although that legacy consist of non-taxable Government bonds. This Court in that case quoted with approval (see page 123) the opinion of the Court of Appeals of New York, where it is said:

> It is true that where a tax is laid upon the property of an individual or a corporation, so much of their property as is vested in United States bonds is to be treated, for the purposes of assessment, as if it did not exist, but this rule can have no application to an assessment upon a franchise, where a reference to property is made only to ascertain the value of the thing assessed.

The Court also said (p. 134):

> We think the conclusion, fairly to be drawn from the state and Federal cases, is, that the right to take property by will or descent is derived from and regulated by municipal law; that, in assessing a tax upon such right or privilege, the State may lawfully measure or fix the amount of the tax by referring to the value of the property passing; and that the incidental fact that such property is composed, in whole or in part, of Federal securities, does not invalidate the tax or the law under which it is imposed.

So, in *United States* v. *Perkins*, 163 U. S. 625, it is held that although the property of the United States can not be taxed by a State, nevertheless an inheritance tax imposed by the State of New York might properly be measured by the amount of a gift to the United States.

In *Orr v. Gilman*, 183 U. S. 278, the State of New York provided that the exercise of a power of appointment should be deemed a taxable transfer. This Court held that such a provision did not conflict with the Federal Constitution, although there was in fact no transfer from the decedent. To the same effect is the case of *Chanler* v. *Kelsey*, 205 U. S. 466. In the case of *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, it is held reasonable to fix the amount of tax by wealth (see page 303), so that a rate of six per cent on legacies above fifty thousand dollars was reasonable, although the rate

on legacies of $10,000 or less was three per cent. In this case the Court said (p. 300):

> * * * The tax is not on money; it is on the right to inherit; and hence a condition of inheritance, and it may be graded according to the value of that inheritance.

In the case of *Bullen* v. *Wisconsin,* 240 U. S. 625, it is held that the State of Wisconsin had power to include in the measure of the tax the value of a trust fund created by a resident of Wisconsin but actually located and administered in the State of Illinois.

After an exhaustive review of the cases this Court decided in *Flint* v. *Stone Tracy Company,* 220 U. S. 107, that the only constitutional restriction upon the authority of Congress to fix the measure of an excise tax is that the measure must not be arbitrary, but must be based upon a reasonable ground and bear a just and proper relation to the subject matter of the excise. The Court said (pp. 165, 167):

> It is contended that measurement of the tax by the net income of the corporation or company received by it from all sources is not only unequal, but so arbitrary and baseless as to fall outside of the authority of the taxing power. But is this so? Conceding the power of Congress to tax the business activities of private corporations, including, as in this case, the privilege of carrying on business in a corporate capacity, the tax must be measured by some standard, and

none can be chosen which will operate with absolute justice and equality upon all corporations.

* * * * *

We must not forget that the right to select the measure and objects of taxation devolves upon the Congress and not upon the courts, and such selections are valid unless constitutional limitations are overstepped. (Page 167.)

3. *The measure of the tax bears a reasonable and proper relation to the occasion of the tax.*

This Court had occasion to consider the nature of insurance in the case of *Penn Mutual Life Insurance Company* v. *Lederer*, 252 U. S. 523. In that case it is pointed out by Mr. Justice Brandeis that (p. 531):

* * * All life insurance has in it the element of protection. That afforded by fraternal beneficiary societies, as originally devised, had in it only the element of protection. There the premiums paid by the member were supposed to be sufficient, and only sufficient to pay the losses which will fall during the current year; just as premiums in fire, marine, or casualty insurance are supposed to cover only the losses of the year or other term for which the insurance is written. * * * But in level-premium life insurance, while the motive for taking it may be mainly protection, the business is largely that of savings investment. The premium is in the nature of a savings deposit. Except where there are stockholders,

> the savings bank pays back to the depositor his deposit with the interest earned less the necessary expense of management. The insurance company does the same, the difference being merely that the savings bank undertakes to repay to each individual depositor the whole of his deposit with interest; while the life insurance company undertakes to pay to each member of a class the average amount (regarding the chances of life and death); so that those who do not reach the average age get more than they have deposited, that is, paid in premiums (including interest) and those who exceed the average age less than they deposited (including interest.)

Now, it can hardly be questioned that a deposit by A in a Savings Bank to be paid with accumulations to B on A's death would constitute a gift intended to take effect in possession or enjoyment at or after A's death, and therefore properly included in A's gross estate under Section 402 (c) of the Act (40 Stat. 1097). *Shukert* v. *Allen,* 300 Fed. 754.

There are differences, of course, between a savings deposit and the taking out of a life insurance policy on one's own life for the benefit of another. These differences, although they appear at first glance important, are superficial when used to differentiate such a contract from a gift intended to take effect in possession or enjoyment at or after death. For instance, the amount of the invest-

ment; in the case of a deposit the increment can usually be foretold—a deposit of $100 will earn a certain amount of interest in a given time; but in the case of a policy a premium of $100 may result in the payment of a much larger sum if the insured dies before other premiums are paid. In both cases, however, the amount received grows out of the amount paid. The amount received rather than the amount paid is included in the gross estate because the Statute throughout contemplates that the value of the gift shall be determined at the time of death.

The increment to the gift does not change the nature of the transaction. If I pay $100 for a tract of land and require the vendor to hold the property as trustee for my son and to convey to him at my death, the fact the discovery of oil on the premises or the change in use or value of surrounding property greatly enhances its value does not negative the fact that I have made a gift of the land to my son. So in the case of an insurance policy, the beneficiary gets what the insured pays for, whether the value be great or small when compared with the cost.

It is, of course, true that the beneficiary has a vested interest in the policy. But the ownership of the policy as such is worthless. Its only value is the assurance that at the death of the insured a certain sum will be paid. There is no true "possession or enjoyment" of a policy. The possession or enjoyment attaches when, and only when, the money

is paid. The Statute provides for the inclusion of such proceeds from insurance policies, not because of the legal situation of the beneficiary as the owner of the policy but because of his practical situation as the owner of a species of property which is not susceptible of any present practical enjoyment. The policy may perhaps be sold or pledged and the proceeds of such sale or pledge presently enjoyed. But the nature of the contract is not thereby changed, for in reality what the beneficiary disposes of is his right to future enjoyment. Indeed, the typical case of that class of gifts which, being intended to take effect in possession or enjoyment at or after the death of the donor, are almost universally included within the scope of inheritance tax statutes, is the case of a gift presently vesting the right to future enjoyment. It is held that such gifts are taxable, regardless of the vesting of title or of the right to future enjoyment, if the actual enjoyment of the property which comprised the *present* right to the earnings, income, and avails thereof is postponed until the donor's death. *People* v. *Kelley,* 218 Ill. 509; *Re Cornell,* 170 N. Y. 423; *State* v. *Probate Court,* 102 Minn. 268; *American Bd. Comm'rs* v. *Bugbee,* 98 N. J. L. 84, 118 Atl. 700; *People* v. *Shaffer,* 291 Ill. 142; *People* v. *Danks,* 289 Ill. 542; *In re Felton's Estate,* 176 Calif. 663; *Harber* v. *Whelchel,* 156 Ga. 601.

The same result is reached where the donor reserves no title to or interest in the property (*Reish* v. *Com.,* 106 Pa. St. 521; *Re Todd's Estate,* 237 Pa.

466: *Re Bottomley's Estate,* 92 N. J. Eq. 202) or merely deprives the donees of the income during the donor's lifetime. *People* v. *Tavener,* 300 Ill. 373; *In re Patterson,* 146 App. Div. N. Y. 286, 130 N. Y. S. 970, affirmed 204 N. Y. 677, 98 N. E. 1109; *Re Cruger,* 54 N. Y. App. Div. 405, 66 N. Y. S. 636.

If the contention is made that in certain classes of policies the payment is not dependent upon death so that a beneficiary comes into enjoyment before the death of the grantor, it is sufficient to say that this is not such a case, and that the Statute provides for such cases by its language, since only the amounts which were " receivable " at the time the gross estate is determined—that is, at death—are therein included.

The case might also arise where after the creation of a vested right in a beneficiary the insured discontinued the payment of the premiums. Doubtless the beneficiary would have the right either to continue the policy in force by paying the subsequent premiums or to take the surrender or paid-up value of the policy. In such case it would seem that the amount given to the beneficiary is no more than the surrender or the paid-up value of the policy. This situation does not arise in the present case, and therefore it is not necessary either to discuss or determine what amount, if any, the Statute requires shall then be included in the gross estate. In the instant case the insured paid the premiums and the amounts which the companies agreed to pay in consideration of those premiums

were receivable by the beneficiaries and were received by them after death and without cost to them.

In such a transaction is there any "real" similarity to the transmission or power to transmit property by death? The defendants in error say there is not, because since the insurance policies were not the property of the decedent, there is no "transmission of property from the dead to the living," which transmission is said in *Knowlton* v. *Moore*, 178 U. S. 41, to be the immediate basis of the tax. Disregarding for the time the unquestioned fact that in the instant case there was undoubtedly a transmission of property from the dead to the living, so that a sufficient basis for the tax exists, and the further fact that we are now dealing not with the basis of the tax but with its measure, it is respectfully submitted that the transmission of property contemplated by this Court in the *Knowlton case* is the transmission not of title but of the thing itself, and that a transmission of the enjoyment is the real basis of all death duties. This theory is the basis of the decision in the case of *Scholey* v. *Rew*, 23 Wall. 331. In that case the tax was expressly laid upon the coming into possession of real estate upon the death of another, whether that other be the creator of the estate or merely the predecessor in enjoyment. This Court said (p. 348–349):

> Sufficient appears * * * to make it plain that the exaction is not a tax upon the land, and that it was rightfully levied, if the

findings of the court show that the plaintiff became entitled, in the language of the section, or acquired the estate or the right to the income thereof by the devolution of the title to the same, as assumed by the United States.

Doubt upon that subject, it would seem, can not be entertained if it be conceded that the subject matter of the assessment is the devolution of the estate or the right to become beneficially entitled to the same, or the income thereof, in possession or expectancy, under the circumstances and conditions specified in the other parts of the section.

So in the case of *Wright* v. *Blakeslee,* 101 U. S. 174, the owner of the property died long prior to the passage of the Act imposing the tax. He devised the property to one for life with the remainder to others. The life tenant died after the passage of the Act, and this Court held that the falling in of the life estate vesting possession and enjoyment in the remainder was a taxable occasion.

In the case of *Keeney* v. *New York,* 222 U. S. 525, this Court in considering the necessary requisites to the validity of the tax generated by death said (pp. 535–536):

> * * * Where the grantor makes a transfer of property to take effect on the death of a third person, it might, under the ruling in *Scholey* v. *Rew, supra,* be taxed as a devolution or succession. But under such an instrument the grantor does not retain the use and power during his own lifetime,

> the remainder does not fall in at his death, and such conveyances would not be so often resorted to as a means of evading the inheritance tax. 194 N. Y. 287. They are not so testamentary in effect as those transfers wherein the grantor provides that the property shall go to his children, or other beneficiary, at and after his death.

The inherent likeness between the transmission of property at death and the purchase of insurance for the benefit of another is that in both cases there is a gift and the enjoyment of that gift is effective at death. Although the legal title passed, and the right to future enjoyment vested at the time the policies were assigned, and not at the death of the insured, nevertheless the property itself, which in substance is a certain sum of money, and the present use and enjoyment of that property, did not vest until the donor's death, and until that time was as has been shown either contingent upon the continuance of the agreed premium payments or if not contingent was to that extent not included under the statute in the gross estate. So far as the substance of the matter as it relates to the enjoyment of property is concerned, the transaction is a testamentary disposition. It is a gift which the beneficiary enjoys at, but not before, death. It is the enjoyment, and not the right to future enjoyment, which has seemed to Congress a proper criterion by which the classification should be fixed. In this view Congress follows that taken by the State Legislatures generally.

This view not only is reasonable and warranted by the expressions of this Court, but also it is necessary if manifest injustice and inequality in the operation of an estate tax law is to be avoided. Perhaps there is no more general form of accumulating funds and providing benefactions for one's dependents than the purchase of life insurance. In its modern form the investment feature is at least coequal with the protection feature of such a contract. Many men have no other accumulations, and yet their dependents are bountifully provided for at their death. To permit a man to save his money for the benefit of his heirs by purchasing insurance without becoming liable to death duties and at the same time to tax the transfer by death of money accumulated in any other manner for the benefit of one's heirs is most unreasonable, for, after all, the philosophy which underlies and justifies all death duties is that the citizen at his death must pay a tax for the privilege of accumulating property. Manifestly, then, he who accumulates for the benefit of his heirs should, if he pay a tax at all, pay one commensurate with the privilege he has enjoyed regardless of the form of his enjoyment.

There is also the other point of view; that of those charged with the duty of providing by law for the operating revenues of the Government. If it is deemed wise to provide such revenues by imposing a death duty, it would seem that the law should take that form which will give it an effec-

tive operation. It is not an unnatural or reprehensible desire which leads property owners to adopt all lawful means to avoid taxes. But regardless of the motive which leads to such an end the results, in so far as the Government's revenues and other taxpayers are concerned, are the same as though the purpose and intent to avoid the tax were actively present and successfully effected. One of the purposes which the provision under consideration serves is to preclude as far as possible an injustice to those taxpayers who have not accumulated their savings in the form of life insurance and to secure to the Government its revenues whenever by reason of death one person becomes entitled to use and enjoyment of property which another man has paid for. As this Court said in *Flint* v. *Stone Tracy Company,* 220 U. S. 107, 173–174:

> * * * Such details are not wholly arbitrary, and were deemed essential to practical operation. Courts can not substitute their judgment for that of the legislature. In such matters a wide range of discretion is allowed.

No Court, not even the Court below, has suggested that such a measure is an unreasonable and arbitrary measure. It has been the practice to include such transfers in the measure of the English Tax since 1862. *Hanson's Death Duties,* 6th Ed., pages 621, 706; *Atty. Gen.* v. *Johnson* (1902), 1 Kings Bench, 416, 423.

The State of Wisconsin has gone so far as to include as the property of a decedent all insurance which is payable upon his death (Wisconsin State Laws, 1915, Ch. 253, page 257), and the Courts of that State have upheld the provision as constitutional. Will of *Allis,* 174 Wis. 527.

In that case the Supreme Court of Wisconsin said (pp. 534–535):

> In addition to the foregoing consideration, it is manifest that this insurance fund in the hands of the widow is within the field of inheritance taxation even if it were considered that the husband's interests had been transferred to his widow before his death under the terms of the insurance contract. Such a transaction would, in substance, be a transfer of his property to her and constitutes in legal effect a transfer of the same kind as is accomplished by a gift. It must be borne in mind that the statute provides: "Insurance payable upon the *death* of any person shall be deemed a part of his estate for the purposes of the tax." Here we have a plain declaration that such a transfer which was intended to take effect in possession or enjoyment when the husband died shall be subjected to the tax upon the ground that the widow in fact came into possession and enjoyment of this property from him at his death. As stated in the *Ebeling Case:* "Whether these gifts, therefore, be held to be gifts in contemplation of death or gifts

inter vivos, they are not beyond the power of the Legislature to tax."

As above indicated, the result of buying these policies by the husband is that he in a proper and legal sense transferred to his widow a substantial part of his estate, and that such transfer became consummated in possession and enjoyment at the time of his death and hence is one which the Legislature had the power to tax.

These considerations place the statute beyond the objection and claims of the respondent to the effect that the life insurance received by the widow can in no sense be considered estate in which the husband had no interest; that there is no succession to or transfer of the property within the field of inheritance taxation; or that the property is not taxable because the widow's rights became fixed and vested before the passage of ch. 253, Laws of 1915, and that the act violates the Fourteenth Amendment to the Federal Constitution by denying to the widow the equal protection of the law or depriving her of her property without due process of law.

The Court will observe that the basis of the contention of defendants in error, although variously stated, is in substance rested upon this proposition: Since the tax is on the transmission of property by death, it is not constitutional or reasonable either to impose the tax upon, or to measure the tax by, a transaction which does not effect a transfer of

the decedent's property by his death. The Court below rested its decision on this ground, saying:

> It is defendant's contention that the property itself is not taxed; that the tax is an excise on the right to transmit property at death; that the inclusion of nontaxable property in the measure of the tax does not make the Act unconstitutional, if the measure of the excise be reasonable; and that it is reasonable to measure such tax by including the value of any property of which the decedent has made testamentary disposition; that the purchase of a policy of insurance on one's life is a testamentary disposition, and, therefore, the Act is valid.
>
> The answer to this position is, that the Act undertakes to impose the tax upon the transfer of the net estate of the decedent, an excise on its passing as the result of death, as distinguished from a tax on property itself. Here, there is no transfer at death, no passing of the property upon whose value the percentages of taxation are based.

This same position has been taken in other cases before this Court and strenuously argued by counsel and in dissenting opinion. But so far the Court has not been led to adopt it as a necessary or proper premise upon which to base its decision. For instance, in the case of *Chanler* v. *Kelsey,* 205 U. S. 466, counsel states his position to be (p. 468):

> The power of the State to take property by means of a succession tax arises only

> when the succession is caused by the death of the former owner of the property taken.

This same position was the basis of the dissenting opinion in that case. Yet the majority of this Court held in that case that the exercise of the power of appointment by the will of the decedent who died after the passage of the Act was properly classified as a taxable transfer, although the property passed under the deeds which created the power and which were executed long prior to the enactment of the tax law. So in *Keeney* v. *New York*, 222 U. S. 525, the Court says that the ending of a life estate of one who was never the owner of any other interest in the property may afford a proper occasion for the imposition of an inheritance tax.

Nor does the disregard of this contention so result that the tax on one man's property is measured by the value of another man's property, a situation which in *Knowlton* v. *Moore,* 178 U. S. 41, 76, is said to have been beyond the contemplation of Congress. The present tax is generated by death and immediately rested upon the transmission of property, which under the decisions of this Court includes the possession and enjoyment of property at death. The measure of that tax includes the value of property which, except for a previous transfer of title, would actually have been a part of the decedent's estate and transferred by his death, and which, in spite of the previous transfer of title, did not come into possession and enjoyment until death and

which in substance and fact was transferred by way of gift in such a manner that the fruition of the transferee's rights came only at death. It was a quasi testamentary disposition of the decedent's property—a gift effective at death.

Moreover, in *Knowlton* v. *Moore, supra,* the Court expressly refused to hold that such a measure, if provided, would be unconstitutional (see page 77); and in the case of *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 283, the Court held that there was no constitutional objection to the adoption by the States of the very measure considered in *Knowlton* v. *Moore, supra.* Certainly the restrictions imposed upon the power of Congress are no less extensive than those imposed upon the States.

In the case of *Maxwell* v. *Bugbee,* 250 U. S. 525, it was held that a tax imposed upon the passing of the personal property of a nonresident decedent to his personal representative in New Jersey—that is, upon the succession of the New Jersey administrator—might properly be measured by including the value of real estate outside of New Jersey and of other property to which the representative did not succeed and which was not included in the measure of the tax in the case of a resident decedent. In *Flint* v. *Stone Tracy Company* there was included in the measure of a tax upon the privilege of doing business in a corporate capacity the income from property not used in such business, and in *United States* v. *Singer,* 15 Wall. 111, a tax upon the right of doing business as a distiller was

measured by "Eighty per cent of the producing capacity of his distillery," whether in fact the production amounted to that amount or not.

Perhaps certain cases can be imagined where hardship and inequality results from the measure adopted. Perhaps the case at bar presents such a situation, but it must always be remembered that—

> * * * Absolute equality is impracticable in taxation, and it is not required by the equal protection clause. And inequalities that result not from hostile discrimination, but occasionally and incidentally in the application of a system that is not arbitrary in its classification, are not sufficient to defeat the law. *Maxwell* v. *Bugbee,* 250 U. S. 525, at page 543.

See also *Veazie Bank* v. *Fenno,* 8 Wall. 533; *McCray* v. *United States,* 195 U. S. 27; *Flint* v. *Stone Tracy Company,* 220 U. S. 107.

As was said in the case last above cited (pp. 167, 169):

> * * * It is no part of the function of the court to inquire into the reasonableness of the excise, either as respects the amount or the property upon which it is imposed.
>
> * * * * *
>
> The argument, at last, comes to this: That because of possible results, a power lawfully exercised may work disastrously, therefore the courts must interfere to prevent its exercise, because of the consequences feared. No such authority has ever been invested in any court. The remedy for such wrongs,

> if such in fact exist, is in the ability of the people to choose their own representatives, and not in the exertion of unwarranted powers by courts of justice.

Certainly, if under the equal protection clause, States are not required to prevent hardships and inequalities there is no restriction upon Congress in this regard.

If the contentions thus far made are correct, and the tax is an excise measured in part by the amount received under insurance policies, and there is a reasonable relation between the transfer of property by death and the taking out of life insurance payable to another, because the result is a gift, the enjoyment of which is postponed until the donor's death, then it is hard to see why the time when the decedent took out the policy should affect the question of reasonableness.

Likewise, it is hard to see how the time when the policy was assigned affects the question. If the purchase of insurance on one's own life for the benefit of another is quasi testamentary when made after the act, it must be equally quasi testamentary when made before the act. The classification is not based upon the transfer of title but upon the effect of the transaction. It is the relation of death to the enjoyment which impresses upon such a transaction its testamentary characteristics. This relation is inherent and in no sense depends upon the time when the transaction occurs. Such transactions are not testamentary because of the tax law, nor would

they be less testamentary if there were no tax law. They are testamentary because they come gratuitously to the enjoyment of the donee at the time of the donor's death. Consequently, the classification is none the less reasonable because of the incidental circumstance that the classification was made after the transfer was made. In other words, the classification is based upon inherent qualities and not upon incidental circumstances. The time of the gift changes neither its inherent testamentary character nor the injustice and inequalities resulting from omiting it from the measure of the tax. Certainly such a classification can not be said to go beyond the wide latitude by which the discretion of Congress is bounded. *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 294.

The power of Congress to measure a tax by an occasion, transaction, or circumstance which is past at the time the tax is imposed has been upheld by this Court. In considering the Revenue Act of 1913, which was retroactive in that it taxed income earned prior to the passage of the Act, this Court held the retroactive provisions constitutional. *Brushaber* v. *Union Pacific Railroad Co.*, 240 U. S. 1.

In *Hylton* v. *United States*, 3 Dall. 171, a tax on carriages for the convenience of persons kept for private use was upheld as a valid excise, although it was measured by carriages so kept on the 5th day of June, 1894, the day on which the law became effective. The backward reach of the Stat-

ute in this case was short, but the period of retroactivity should not determine the validity of such a provision.

In *Flint* v. *Stone Tracy Company*, 220 U. S. 107, a tax on the privilege of doing business in a corporate capacity was sustained, although the measure of the tax was in part income earned before the passage of the Act.

The tax imposed by the Revenue Act of 1916 with respect to carrying on or doing business by corporations and measured by the fair average value of the corporate stock for the preceding year is valid. *Washington Water Power Company* v. *United States*, 56 Ct. Cls. 76.

Under this Act the tax upon corporations doing business in 1917 was measured by the fair average value of the capital stock for the year 1916, although a major portion of that year had elapsed prior to the passage of the Act.

Under the Revenue Act of 1916 an excise on manufacturers of war munitions was imposed "upon the entire net profits actually received or accrued for said year from the sale or disposition of such article manufactured in the United States." This Court held the Act applicable to munitions manufactured and sold on contracts made in 1915. *Carbon Steel Company* v. *Lewellyn*, 251 U. S. 501.

In *Patton* v. *Brady*, 184 U. S. 608, an excise was imposed upon the manufacture and sale of certain articles, to wit, tobacco, and was measured by one-half the differences between the tax already paid

(prior to the Act) and the tax imposed by the Act on a similar article.

In *Railroad Company* v. *Collector*, 100 U. S. 595, an excise tax upon the business of corporations was measured in part by interest on funded debt—an obligation assumed before the passage of the Act.

In *Stockdale* v. *The Insurance Companies*, 20 Wall. 323, it is held that the Income tax of 1864 is a constitutional excise, although the measure of the tax was all the income of the previous year. It is interesting to note that in this case, as also in the *Patton case, supra*, the measure of the tax had been previously used to measure another excise tax.

In the case of *Pennsylvania Company, etc.*, v. *Lederer*, 292 Fed. 629 (D. C. E. Pa.), it is held proper to measure the estate tax under the Revenue Act of 1918 by the value of property passing under the general power of appointment created before but executed after the passage of the Act.

In *McElligott* v. *Kissam*, 275 Fed. 545 (C. C. A. 2nd, Cir.), it is held that it is reasonable to measure the tax by the full value of a joint tenancy created by the decedent out of his property prior to the passage of the Act when his death occurred after the passage of the Act. (This case was reversed on another ground in *Knox* v. *McElligott* 258 U. S. 546.)

In *Congdon* v. *Lynch* (D. C. Minn.), unreported to date (T. D. 3324, 24 T. D. 736, Jan.–Dec., 1922),

it was held that there was no constitutional objection to construing the provisions of the Revenue Act of 1916 so as to include a trust intended to take effect in possession or enjoyment at or after death, although the trust was created prior to the passage of the Act.

The Circuit Court of Appeals for the Sixth Circuit held in the case of *Shwab* v. *Doyle*, 269 Fed. 321, that the Federal Estate tax levied by the Act of 1916 was constitutional, although relating to transfers made prior to its passage. This case was reversed by this Court (258 U. S. 529) on the ground that the Revenue Act of 1916 contains no clearly expressed intention that it shall be retroactive in operation, but not upon the ground of unconstitutionality.

The retroactive provisions of Section 402 (c) of the Revenue Act of 1918, 40 Stat. 1097, relating to transfers and trusts in contemplation of death or intended to take effect in possession or enjoyment at or after death, was held to be constitutional in *Safe Deposit & Trust Company, Executor of Albert,* v. *Tait,* 295 Fed. 429 (D. C. Md.), and in *Mercantile Trust Company* v. *Hellmick* (D. C. E. Mo.), unreported to date (T. D. 3545, 45 T. D. 33, Feb. 14, 1924 (No. 7)).

II

Assuming for the purposes of the argument that the transfer of title to the insurance policies is the subject of the tax, the act is not unconstitutional

In *New York Trust Company* v. *Eisner*, 256 U. S. 345, this Court said (p. 349):

> * * * After the elaborate discussion that the subject received in that case (*Knowlton* v. *Moore*), we think it unnecessary to dwell upon matters that in principle were disposed of there. The same may be said of the argument that the tax is direct and therefore is void for want of apportionment. It is argued that when the tax is on the privilege of receiving, the tax is indirect because it may be avoided, whereas here the tax is inevitable and therefore direct. But that matter also is disposed of by *Knowlton* v. *Moore*, not by an attempt to make some scientific distinction, which would be at least difficult, but on an interpretation of language by its traditional use—on the practical and historical ground that this kind of tax always has been regarded as the antithesis of a direct tax; "has ever been treated as a duty or excise, because of the particular occasion which gives rise to its levy." 178 U. S. 81–83. Upon this point a page of history is worth a volume of logic.

But the distinction is sought to be made that there the Court was considering the Statute as prospective, while here the contention is that the tax is laid upon the transfer, and that to tax a past action

or event is not the taxing of a privilege because it has already been exercised, but is a direct tax upon the estate from which it is to be paid. This distinction depends upon construing the Act so that the tax thereby imposed is attached to the technical transfer of the property which is supposed to take place at a particular moment of time. It is important, therefore, to consider the exact nature of this tax.

After a very exhaustive and learned review of tax legislation of this character this Court said in *Knowlton* v. *Moore,* 178 U. S. 41, 47:

> * * * Taxes of this general character are universally deemed to relate, not to property *eo nomine,* but to its passage by will or by descent in cases of intestacy, as distinguished from taxes imposed on property, real or personal as such, because of its ownership and possession. In other words, the public contribution which death duties exact is predicated on the passing of property as the result of death, as distinct from a tax on property disassociated from its transmission or receipt by will, or as the result of intestacy.

And again upon the same subject (p. 57):

> Confusion of thought may arise unless it be always remembered that, fundamentally considered, it is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties. The qualification of such taxes as privilege taxes, or describing them as levied

> on a privilege, may also produce misconception, unless the import of these words be accurately understood.

That Act laid a tax only upon the passing of property by will or inheritance. But that the Court is not greatly concerned about a technical definition of the tax appears from the following language in *Cahen* v. *Brewster*, 203 U. S. 543, 550–551:

> For definitions of an inheritance tax plaintiffs in error adduce *United States* v. *Perkins*, 163 U. S. 625; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283; *Knowlton* v. *Moore*, 178 U. S. 41. The tax was defined in the *Perkins case* to be "not a tax upon the property itself, but upon its transmission by will or descent;" and in the *Magoun case*, "not one on property, but one on the succession." In *Knowlton* v. *Moore*, it was said that such taxes "rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being, and that it is the power to transmit or the transmission from the dead to the living, on which such taxes are more immediately rested." But these definitions were intended only to distinguish the tax from one on property, and it was not intended to be decided that the tax must attach at the instant of the death of a testator or intestate. In other words, we defined the nature of the tax; we did not prescribe the time of its imposition.

Therefore it is not necessary to hunt out any particular moment when it may be said the tax attaches. What is really taxed is the passing of the property *because of the death of its owner, whether his death follows, is coincident with, or precedes the consummation of its passing.*

And the death of the owner must always be kept in mind, *because the tax can not attach until the happening of that event.* If the owner die intestate, the title to the real estate passes instantly to the heirs; but not so the personalty. It will most likely be converted into cash and distributed in that form. The same may be said when the estate passes by will. When a transfer is made, or trust created, to take effect in possession or enjoyment at or after the death of the donor, the passing of the property extends from the execution of the transfer or trust to the taking of possession by the transferee.

In the case of an insurance policy taken out for, or assigned to, another, the transfer commences when the insured enters into the contract, but is completed only when death occurs and the insurer pays. While the right to the property may become irrevocably vested when the contract is executed, just as it does when an instrument creating a trust or a remainder estate is delivered, yet that which makes the property really valuable, its possession and use, has not passed. The beneficiary has only a present right to the future proceeds of the policy the amount of which is conditional. The

policy contract is not the substance of the gift. It is merely evidence of it and the real gift is a sum of money to be paid *at death.* Thus the gift is not complete in possession and enjoyment until death.

The word "transfer" as used in the Statute certainly includes the passing of both the title and the possession. The transfer may pass both the title and the possession at once, as in the case of a gift made in contemplation of death, or only the title, as in the case of the purchase of a policy of insurance, or both may hang in suspense for an indefinite length of time, as in the case of a contingent remainder after a life estate in the donor. But in any case the *occasion* for the tax is not completed by the mere transfer and will not be complete until the death of the donor. Both the transfer and the death are prerequisites of the tax. Hence, in a sense, under such circumstances, the tax is always retroactive in that when called into being by the death of the donor it reaches back to the transfer. But it is the occasion composed of the two elements, the transfer and the death, that is taxable.

A review of some of the cases in which retroactive excise tax statutes have been sustained will be helpful upon this question.

Stockdale v. *The Insurance Companies,* 20 Wall. 323, 331, 332, involved the validity of a tax on incomes which was then regarded as an excise tax.

The taxes complained of were assessed under the Act of July 14, 1870, c. 255, sec. 6, 16 Stat. 256, 257,

upon dividends declared by the insurance companies on the earnings which had accrued to the company between the 5th day of July, 1869, and the 30th day of June, 1870, and that the dividend upon which the tax was assessed was declared after the latter date.

The Court, however, held that the assessment was valid, saying (p. 331):

> The right of Congress to have imposed this tax by a new statute, although the measure of it was governed by the income of the past year, can not be doubted; much less can it be doubted that it could impose such a tax on the income of the current year, though part of that year had elapsed when the statute was passed. The joint resolution of July 4, 1864, imposed a tax of five per cent upon all income of the previous year, although one tax on it had already been paid, and no one doubted the validity of the tax or attempted to resist it.
>
> Both in principle and authority it may be taken to be established, that a legislative body may by statute declare the construction of previous statutes so as to bind the courts in reference to all transactions occurring after the passage of the law, and may in many cases thus furnish the rule to govern the courts in transactions which are past, provided no constitutional right of the party concerned is violated.

And further (p. 332):

> * * * where it can exercise a power by passing a new statute, which may be retroactive in its effect, the form of words which it uses to put this power in operation can not be material, if the purpose is clear, and that purpose is within the power. *Congress could have passed a law to reimpose this tax retrospectively, to revive the sections under consideration if they had expired, to reenact the law by a simple reference to the sections.* [Italics ours.]

Cahen v. *Brewster,* 203 U. S. 543, 549, involved an application of the inheritance tax law passed by the Legislature of Louisiana on June 28, 1904. Levy, upon whose estate the tax was assessed, died May 26, 1904. The will was probated May 30, 1904, and an inventory of his estate was filed June 9, 1904, nineteen days before the act was passed. A supplementary inventory was filed August 31, after the act was passed; and on the same day the final accounting was filed and judgment entered ordering a distribution of the funds on August 16. The law provided that the tax was—

> to be collected on all successions not finally closed and administered upon, and all successions hereafter opened (p. 548).

The right to the property of course became vested upon the death of the testator, yet the court held that a State may exercise its power to impose an inheritance tax at any time while it holds the prop-

erty from a legatee, and that the tax was not a deprivation of property without due process of law within the meaning of the Fourteenth Amendment as to the legatees of a decedent dying prior to its enactment, but whose estates remained undistributed.

As this case arose under a State statute, the validity of which was determined under the provisions of the Fourteenth Amendment, it is especially significant, because it shows that this court does not regard the vesting of a right to property as prohibiting, even under that amendment, the imposition of a tax thereon where anything remains to be done before its possession by the owner is complete.

Billings v. *United States,* 232 U. S. 261, involved the construction of Section 37 of the Tariff Act of August 5, 1909 (c. 6, 36 Stat. 11, 112), laying a tax on foreign-built yachts. The act went into effect on August 6, 1909, and provided that the tax should be collected annually on the first day of September. It was insisted that it could not apply to the twelve months preceding the first day of September, 1909, as it would act retroactively for nearly an entire year. However, the court held that Congress possessed the power to impose such retroactive tax, and that the statute should be so construed. The fact that the use of the yacht for the period preceding the passage of the Act had already been exercised was not supposed to have changed the tax for that period into a direct tax.

The classification of the taking out of a life-insurance policy prior to the passage of the Act with the transfers of Estates by other methods described in the Act is not unjust and arbitrary. That the classification here made is entirely proper, and, moreover, that it is within the discretion of Congress to select the objects of taxation is shown by the following and many other decisions of this Court.

In *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 283, 290, one ground upon which it was insisted that the inheritance tax law of Illinois was in conflict with the Fourteenth Amendment was because it contained an improper classification for taxation. Upon that subject the Court said (p. 296):

> There are three main classes in the Illinois statute, the first and second being based, respectively, on lineal and collateral relationship to the testator or intestate, and the third being composed of strangers to his blood and distant relatives. The latter is again divided into four subclasses dependent upon the amount of the estate received. The first two classes, therefore, depend on substantial differences, differences which may distinguish them from each other and them or either of them from the other class—differences, therefore, which " bear a just and proper relation to the attempted classification "—the rule expressed in the *Gulf, Colorado & Santa Fe Railway* v. *Ellis,* 165 U. S. 150. And if the constituents of each class are affected alike, the rule of equality pre-

> scribed by the cases is satisfied. In other words, the law operates "equally and uniformly upon all persons in similar circumstances."

If such a classification was valid under the Fourteenth Amendment, certainly the classification here complained of can not render invalid this provision of the Act when Congress is not limited in its power to classify subjects for taxation.

In *Flint* v. *Stone Tracy Company,* 220 U. S. 107, 145, 158, 169, the Court said (p. 158):

> In levying excise taxes the most ample authority has been recognized from the beginning to select some and omit other possible subjects of taxation, to select one calling and omit another, to tax one class of property and to forbear to tax another.

Keeney v. *New York,* 222 U. S. 525, 536, involved the validity of a statute passed by the State of New York containing almost the exact language of the statute here in question. Of course, it was insisted that it violated the Fourteenth Amendment, and the classification was therefore a material matter for consideration, but upon this subject this Court said (p. 536):

> There can be no arbitrary and unreasonable discrimination. But when there is a difference it need not be great or conspicuous in order to warrant classification. In the present instance, and so far as the Fourteenth Amendment is concerned, the State

> could put transfers intended to take effect at the death of the grantor in a class with transfers by descent, will, or gifts in contemplation of the death of the donor without at the same time, taxing transfers intended to take effect on the death of some person other than the grantor, or on the happening of a certain or contingent event.

In *Billings* v. *United States,* 232 U. S. 261, 281, with reference to the inequality of a tax upon foreign-built yachts, the court said (p. 281):

> The contention that inequality must be the result from making the tax depend upon mere use without reference to the extent of its duration, addresses itself not to the question of power, and is therefore beyond the scope of judicial cognizance.

III

The provisions effecting the collection of the tax do not affect its nature or render the act unconstitutional

Section 407 of the Revenue Act of 1918 (40 Stat. 1100) provides that the "executor" shall pay the tax. Section 400 (40 Stat. 1096) defines the term "executor" to mean "the executor or administrator or any person who takes possession of any property of the decedent." Section 408 (40 Stat. 1100) provides—

(1) For the collection of the tax by distraint or sale of "the property of the decedent."

(2) For the distribution of the burden of the tax when it is not collected out of that part of the estate

(as distinguished from the gross estate) which passes to the Executor as Executor, e. g., when it is collected out of real estate and imposes such burden upon the residue or upon the property pointed out by a decedent's will.

(3) For the reimbursement of the executor in case any part of the gross estate consists of the proceeds of life insurance policies not payable to the estate.

Section 409 (40 Stat. 1100–1101) provides that a tax shall be a lien upon the gross estate, except that part used to pay charges and the administration expenses, including property transferred in contemplation of death or intended to take effect in possession or enjoyment at or after death and moneys paid to beneficiaries other than the executor under insurance policies and that the person receiving such property shall be personally liable for the tax.

Revised Statutes, Sections 3466 and 3467, provide that if an executor distribute the assets of an estate he shall be individually liable for its debts to the United States, and that such debts shall be entitled to priority.

Considering these sections as a whole it is apparent that Congress was moved to their enactment by two considerations:

First. The necessity of providing an effectual means under all circumstances for the collection of the tax; and

Second. The desire to reimburse those who were made liable for the payment to the end that no injustice should be done to them.

There is nothing to indicate that any change in the nature of the tax was contemplated; none of the sections concern the imposition of the tax; they are merely details deemed proper for the effectual and practical operation of the law. *Flint* v. *Stone Tracy Company*, 220 U. S. 107, 173; *In re Inman's Estate*, 101 Oregon, 182, 199 Pac. 615.

But it is said that whatever the reason for these sections Congress has in fact, by virtue of them, imposed upon the beneficiaries who take no part of the decedent's estate, and whose property is not liable for the payment of the debts of that estate, a part of the burden of the tax upon that estate, and moreover has allocated that burden so unfairly that it is not proportionate to the amount received from the decedent.

The especial reference is to that part of Section 408 (40 Stat. 1100) which reads:

> * * * If any part of the gross estate consists of proceeds of policies of insurance upon the life of the decedent receivable by beneficiaries other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds, in excess of $40,000, of such policies bear to the net estate.

It is to be noted that this section does not make the liability of the Executor for the payment of the tax dependent upon his collecting it from the bene-

ficiaries. It is merely a provision which purports to give the executor a right to reimbursement.

The first objection to a consideration of the meaning and purport of Section 408 is that in this case it was not invoked by the Government nor by the Executor, and its effect is not involved in this case. The Executor, who is the plaintiff in the case at bar, and who actually paid the tax in question, is not harmed by this provision. If it is established either that the proceeds from these policies are a fair measure of the tax, or that the tax is validly imposed upon the gifts of these policies, then the executor can not complain that he is required to pay the tax, much less can he complain that Congress has given him, or attempted to give him, a right to recoup a part of his payment.

Congress has not imposed a tax upon the beneficiaries if the provision is unconstitutional. If it is not unconstitutional, then the burden is lawfully imposed. If this provision is eliminated, the main purpose of Congress—that is, the purpose to impose a death duty payable by the Executor—is still effected by the remaining provisions of the Act. But it is said that Congress in this one instance did not intend to impose a death duty payable by the Executor, but to impose a direct tax upon the beneficiary, and that the provision for adding the proceeds of insurance policies to the gross estate would not have been made except that the tax occasioned thereby was made payable by the recipient of the proceeds of the policies.

As has been shown, the purpose of including such proceeds was twofold:

First. To prevent injustice and inequality in those cases where a man has chosen to accumulate his fortune in the form of life insurance; and

Second. To secure the Government its proper tax where such a choice is made.

Both of these purposes are served if the tax is paid. The matter of who pays the tax is not primarily important. It is a matter which does not concern the Government. *New York Trust Company* v. *Eisner*, 256 U. S. 345; *Edwards* v. *Slocum*, 264 U. S. 61.

Some confusion arises from the inartistic wording of this provision. The Court below read the provision as though it said: The Executor shall be entitled to recover such proportion (not portion) of the total tax paid as the proceeds in excess of $40,000 bear to the net estate and then apply the ratio thus obtained to the tax imposed by the highest bracket. This leads the Court to the conclusion that the beneficiaries were required to pay eighty-nine per cent of the tax levied by reason of the inclusion of these policies. Since the "portion" spoken of in the Statute is the portion of the total tax, and since this tax is the aggregate of the amount due at the several rates, it would seem that the "portion" which the beneficiaries are required to pay is determined by applying the ratio to the amount of the tax in each bracket. If this plan is followed the beneficiaries would pay

the same proportion of the total tax and of the tax arising from the inclusion of the proceeds as those proceeds bear to the net estate. This was the intention of Congress, and does away with the unfairness in the Statute mentioned in the opinion of the Court below.

The Estate Tax Act of 1916 (Act of Sept. 8, 1916, c. 463, sec. 209; 39 Stat. 756, 780) contained a provision that the person who received from the decedent as a gift made in contemplation of death, or intended to take effect in possession or enjoyment at or after death, should be personally liable for the *whole* tax. Although the property so received is no more a part of the decedent's estate and liable for its debts than are the proceeds of insurance, yet this Court did not consider that this provision either changed the nature of the tax or affected its constitutionality; *New York Trust Company* v. *Eisner,* 256 U. S. 345; and it has never been thought that death duties are direct taxes, merely because they are payable out of the shares of the legatees or beneficiaries. *Knowlton* v. *Moore,* 178 U. S. 41; *Will of Allis,* 174 Wis. 527, 184 N. W. 381.

Of course every tax is paid out of property. In every case some property must be looked to for payment. Manifestly the individual property of the Executor should not under ordinary circumstances be required to pay a death duty. The tax must, therefore, be collected either out of the estate or out of the property of the beneficiaries.

Congress has provided that it shall be paid out of property of the estate, and to a limited extent out of the property of a certain class of beneficiaries. If this is a tax on the transmission of property it would seem that the property transmitted would properly be made liable for its payment. The person who is required to pay the tax is not a stranger to the person who owes the tax, as was the case in *Hartman* v. *Greenhow*, 102 U. S. 672, relied upon by the Court below. He is a person having property which the taxpayer gave him, and a beneficiary of a transaction testamentary in character. The property is such property that, except for the reasons which make it properly a part of the gross estate, and thus either the measure or the occasion of the tax, it would not belong to the beneficiary. Those same reasons make it properly liable for payment. What unusual hardship is thus imposed upon the beneficiary? It must be conceded that if this beneficiary had taken this same amount of property by will or by deed, by intestacy, by deed in contemplation of death, or intended to take effect in possession or enjoyment at or after death, the property would be liable for the tax.

To say that the property can not be made liable because the transmission of it was complete prior to the imposition of the tax is only a new way of saying either that the tax is not an excise or that an excise can not be retroactive, for there is no such thing as a right of property " vested " against the sovereign's power to tax. *Gilman* v. *Sheboygan,*

2 Black 510; *Atty. Gen.* v. *Stone,* 209 Mass. 186; 95 N. E. 395. Moreover, the contention ignores the fact that the transmission was not complete prior to the imposition of the tax. Until death the possession and enjoyment did not accrue and the beneficiary's right thereto was contingent upon the continued payment of the premiums. The tax is not imposed because of the ownership of property, and logically the liability for payment is fixed without reference to ownership. However, if the substance of the matter be considered, the property made liable for this tax was a property of the decedent, for it was purchased with his money. Certainly a man can not denude himself of his property and then complain that this property is made liable for taxes.

In *Knowlton* v. *Moore,* 178 U. S. 41, the Act provided for a tax on legacies and distributive shares but was made a lien upon and payable out of the whole of decedent's property. Thus it resulted that a tax on a legacy to A might be collected from B's legacy, yet the Act was held constitutional.

In *Scholey* v. *Rew,* 23 Wall. 331, 347, it was held that a provision for enforcing payment by the creation of a lien upon property did not change the tax into a direct tax.

So in the case of *In re Sherman's Estate,* 179 N. Y. App. Div. 497, 166 N. Y. S. 19, 23, affirmed 222 N. Y. 540, 118 N. E. 1078, it was held that the provisions of the Revenue Act of 1916 for payment do not alter the nature of the tax.

IV

State cases holding retroactive excise laws unconstitutional are not in point

No conclusions can be based upon the decisions of the various State Courts to the effect that retroactive legislation of a nature such as here involved is unconstitutional. In the first place, such cases are decided under constitutional restrictions applicable to States but not to Congress. A State may not so legislate, whether in the form of taxation or otherwise, as to impair a vested right. To do so is to violate the constitutional limitations which prohibit the State from impairing the obligations of a contract. It is doubtful that this limitation prevents the imposition of a retroactive excise by a State. *Nickel* v. *Cole,* 256 U. S. 222. Certainly there is no such limitation upon the power of Congress. Its power to tax is exhaustive, and if the imposition be a tax, then, although it impair the obligations of contracts or interfere with vested rights, it is, nevertheless, valid. *License Tax Cases,* 5 Wall. 462, 471; *United States* v. *Singer,* 15 Wall. 111, 121; *Knowlton* v. *Moore,* 178 U. S. 41, 57, 58; *Patton* v. *Brady,* 184 U. S. 608, 619, 620, 622; *McCray* v. *United States,* 195 U. S. 27, 59, 60, 63; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 158; *Billings* v. *United States,* 232 U. S. 261, 281, 282; *Brushaber* v. *Union Pac. R. R. Co.,* 240 U. S. 1, 20, 24; *United States* v. *Doremus,* 249 U. S. 86, 93.

Because they are the latest cases upon the subject, we call special attention to the last two cases cited.

In *Brushaber* v. *Union Pacific R. R. Co.,* 240 U. S. 1, the validity of the income tax law passed pursuant to the Sixteenth Amendment (38 Stat. page 166), was questioned; and as to the contention that the Fifth Amendment limited the power of Congress to impose taxes, the Court said (p. 24):

> So far as the due-process clause of the Fifth Amendment is relied upon, it suffices to say that there is no basis for such reliance, since it is equally well settled that such clause is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring upon the one hand a taxing power and taking the same power away on the other by the limitations of the due process clause.

United States v. *Doremus,* 249 U. S. 86, involved the validity of the Act regulating the sale and distribution of narcotics, known as the Harrison Act (Act of Dec. 17, 1914, ch. 1, sec. 1, 38 Stat. 785). The only revenue obtained under the Act was a special tax of one dollar per annum paid by each person who was required to register. It was earnestly insisted that, while it appeared under the guise of a Revenue Act, yet it was in fact but a police regulation, and was an encroachment upon the powers reserved to the States. This was an

angle of attack different from the usual one, but the validity of the Act was sustained, the Court saying (p. 93):

> The only limitation upon the power of Congress to levy excise taxes of the character now under consideration is geographical uniformity throughout the United States. This Court has often declared it can not add others. Subject to such limitation Congress may select the subjects of taxation, and may exercise the power conferred at its discretion. *License Tax Cases,* 5 Wall. 462, 471. Of course Congress may not in the exercise of federal power exert authority wholly reserved to the States. Many decisions of this court have so declared. And from an early day the court has held that the fact that other motives may impel the exercise of federal taxing power does not authorize the courts to inquire into that subject. If the legislation enacted has some reasonable relation to the exercise of the taxing authority conferred by the Constitution, it cannot be invalidated because of the supposed motives which induced it. *Veazie Bank* v. *Fenno,* 8 Wall. 533, 541, in which case this Court sustained a tax on a State bank issue of circulating notes. *McCray* v. *United States,* 195 U. S. 27, where the power was thoroughly considered, and an act levying a special tax upon oleomargarine artificially colored was sustained. And see *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 147, 153, 156, and cases cited.

CONCLUSION

It is respectfully submitted that for the foregoing reasons the judgment of the District Court for the Western District of Pennsylvania should be reversed.

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APRIL, 1925.

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Appendix

The following schedule shows the pertinent terms of the various policies involved in this case, together with the details of the payment of premiums and the nature of settlements by which the various policies were liquidated.

1. *Nederland Life Insurance Company, Ltd., No. 54105—dated May 31, 1895—$20,000.*

This policy is a nonparticipating ordinary life policy, and is payable to "Henry Clay Frick, the Insured, Executors, Administrators, or Assigns."

On June 22, 1917, the decedent assigned the policy to Helen Clay Frick, his daughter, or, if she should not be living at his death, to his executors, administrators, or assigns.

Premiums were paid as follows:

1895–1899 (@ $377.80)	$1,889.00
1900–1919 (@ $715.60)	14,312.00
	16,201.00

This policy was liquidated by the payment of the face value, $20,000. The rate at which interest must be compounded on annual payments of $377.80 for five years and thereafter $715.60 for twenty years in order that the principal sums plus interest shall amount to $19,999.50 is 1.781%.

2. *Mutual Life Insurance Company of New York, No. 163109—dated December 19, 1874—$10,000.*

This is an ordinary life policy and is payable to "the assured, his executors, administrators, or assigns."

On April 21, 1882, the assured assigned the policy to his wife.

This policy provided that, except in the case of suicide, all premiums would be forfeited to the Company if the policy ceased or became null and void.

Premiums were paid as follows:

1874–1890 (@ $198.90, less cash dividend of $389.08)	$2,992.22
1891–1918 (@ $198.90)	5,569.20
	8,561.42

The policy was liquidated as follows:

Face	$10,000.00
Additional insurance purchased with $2,810.53 dividends	5,074.00
Post mortem dividend	128.28
	15,202.28

The rate at which interest must be compounded on annual payments of $198.90 for forty-five years, in order that the principal sums plus interest shall amount to $15,202.28, is 2.16%.

3. *Berkshire Life Insurance Company, No. 31580—dated March 18, 1890—$20,000.*

This is an ordinary life policy and is payable to the "Executors, Administrators, or Assigns" of Henry C. Frick.

This policy provided for deferred dividends, the assured having the right to call for additional insurance or the cash value thereof or for a reduction of premiums based on his distributive share of the surplus.

On June 19, 1917, the assured assigned the policy to Helen Clay Frick if she should survive him; otherwise to his executors, administrators, or assigns.

Premiums were paid as follows:

1890–1919 (@ $632.00)	$18,960.00

This policy was liquidated as follows:

Face	$20,000.00
Additional insurance purchased with $3,866 dividends	7,080.00
Post mortem dividend	765.60

4. *State Mutual Life Assurance Company, No. 23135—dated March 18, 1890—$20,000.*

This is an ordinary life policy and is payable to the "executors, administrators, or assigns" of Henry C. Frick.

The policy provides for the payment of the cash surrender or paid-up value of the policy.

On June 19, 1917, the assured assigned the policy to his daughter, Helen Clay Frick, provided she survived him; otherwise the policy should revert to the assured.

Premiums were paid as follows:

1890–1919 (@$632.00)	$18,960.00

The policy was liquidated as follows:

Face	$20,000.00
Additional insurance purchased with $5,361.87 dividends	8,711.00
Final dividends	255.60

5. *Connecticut Mutual Life Insurance Company, No. 190366—dated March 21, 1890—$50,000.*

This is an ordinary life policy with provisions for limited cash surrender value payments and for paid-up insurance.

It is provided that the face value of the policy is "to be paid to his legal representatives," referring to Henry C. Frick.

The policy provides for the payment of the cash surrender or paid-up value of the policy.

On June 19, 1917, the assured assigned the policy to his daughter, Helen Clay Frick, provided she survived him, otherwise the policy should revert

to the assured. The right to revoke the assignment was reserved.

Premiums were paid as follows:

1890–1919 (@ $1,547)	$46,410.00

This policy was liquidated as follows:

Face	$50,000.00
Dividends with interest thereon	21,286.76
	71,286.76

6. *Mutual Benefit Life Insurance Company, No. 158055—dated April 7, 1890—$10,000.*

This is an ordinary life policy, with the usual nonforfeiture provisions. The policy is payable to "Henry Clay Frick, his executors, administrators, or assigns."

On June 19, 1917, the assured assigned the policy to his daughter, Helen Clay Frick, provided she should survive him; otherwise the policy should revert to him.

Premiums were paid as follows:

1890–1919 (@ $308.40)	$9,252.00

This policy was liquidated as follows:

Face	$10,000.00
Additional insurance purchased with $2,008.84 dividends	4,821.00
Final dividend	188.67
	15,009.67

7. *Equitable Life Assurance Society of the United States, No. 164814—dated November 23, 1901—$114,000.*

This policy is a paid-up policy, issued in consideration of the surrender of policy No. 335187, dated November 23, 1886, face value $50,000 (a matured fifteen-year endowment policy), and the dividend accumulation thereon amounting to $10,426.60.

This policy is payable to "Ada H. C. Frick, if living; if not, then her husband Henry C. Frick, his executors, administrators, or assigns."

Policy No. 164814 was liquidated by the payment of $114,000, being paid-up insurance purchased as follows:

Proceeds of endowment policy 336187 (matured 1907)	$50,000
Dividend accumulations on same	10,426
Total cost	60,426

On endowment policy 366187 premiums had been paid as follows:

1886–1901 (@ $3,420.50)	$51,307.50

8. *Equitable Life Assurance Society of the United States, No. B-291284, dated March 17, 1885—$50,000.*

This is an ordinary life policy, with a fifteen-year tontine deferred dividend provision and a special provision for conversion into paid-up insurance.

The policy is payable to "Ada H. C. Frick, if living; if not, then to her husband, Henry C. Frick, his executors, administrators, or assigns."

Premiums were paid as follows:

1885–1899 (@ $1,565)	$23,475.00

This policy was liquidated as follows:

Face	$50,000.00
Additional insurance purchased March 17, 1891, with $7,924.50 dividends	15,600.00
Additional insurance purchased after 1900 with $8,748.01 dividends	12,064.00
Post mortem dividend	380.01
	78,044.01

9. *New York Life Insurance Company, No. A-103332—dated February 2, 1874—$10,000.*

This is an ordinary life policy, with provisions for twenty-year deferred tontine dividends.

The policy provides that after the completion of the tontine period, the assured may apply the accumulated dividend to the purchase of a life annuity, may withdraw the accumulated dividend in cash, withdraw the annuity in cash, or convert the dividend into paid-up insurance.

The policy is payable to "Henry Clay Frick's legal representatives."

On April 22, 1882, the assured assigned the policy to his wife, Ada H. C. Frick.

Premiums were paid as follows:

1874–1919 (@ $198.90)	$9,149.40

This policy was liquidated as follows:

Face	$10,000.00
Dividends, 1895–1919	3,472.00
Post mortem dividend	109.80
	13,581.80

10. *New York Life Insurance Company, No. 197958—dated December 22, 1892—$65,000.*

This is an ordinary ten-payment life policy with a twenty-year deferred dividend provision. The policy provides that after the accumulation period the assured may receive the accumulated dividend in cash, or may apply it to purchase an annuity, or additional paid-up insurance; or he may exchange the policy (together with the accumulated dividend) for cash, for a life annuity, or for a paid-up policy. The policy prevents forfeiture for nonpayment of premiums by providing for extended insurance or conversion into paid-up insurance.

The policy is payable to "the insured's executors, administrators, or assigns."

On June 19, 1917, the assured assigned the policy to Helen Clay Frick, provided that if she prede-

ceased him the assignment should be null and void. He also reserved the right to revoke the assignment.

Premiums were paid as follows:

1892–1901 (@ $1,244.59)	$42,445.00

This policy was liquidated as follows:

Face	65,000.00
Post-mortem dividend	501.80
	65,501.80
Deferred dividends paid in cash in 1912 amounted to	11,736.40
Cash dividends (1913–1918) paid in 1918 amounted to	2,863.25
	14,599.65

Of the cash dividends mentioned Miss Frick received $1,007.80, being the dividends paid after the assignment of the policy.

11. *New York Life Insurance Company, No. 501,052—dated December 29, 1892—$25,000.*

This is an ordinary ten-payment life policy, with a twenty-year deferred dividend provision.

The policy provides that after the accumulation period the assured may receive the accumulated dividend in cash, or may apply it to purchase an annuity, or in addition paid-up insurance; or he may exchange the policy for cash, for a life annuity, or for a paid-up policy. The policy prevents forfeiture for nonpayment of premiums by providing for extended insurance or conversion into paid-up insurance. The policy is payable to the "insured's executors, administrators, or assigns."

On June 19, 1917, the assured assigned the policy to Helen Clay Frick, provided that in the event that she predeceased him the assignment should be null and void. The assured also reserved the right to revoke the assignment.

Premiums were paid as follows:

1892–1901 (@ $1,632.50)	$16,325.00

This policy was liquidated as follows:

Face	$25,000.00
Post-mortem dividend	193.00
	25,193.00
Tontine dividend paid in 1912 amounted to	4,514.00
Cash dividends (1913–1918) paid in 1918 amounted to	1,101.25
	5,615.25

Of the cash dividends mentioned Miss Frick received $353.00, being the dividends paid after the assignments.